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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-696

THE EMPORIUM CAPWELL CO.,
Petitioner,

vs.

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the District of Columbia

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Petitioner, The Emporium Capwell Co., respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the District of Columbia entered in this proceeding on June 29, 1973.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia,[1] the decision of the National Labor Relations Board,[2] and the decision of the Trial Examiner[3] appear in the Appendix hereto. The Trial Examiner found that the Emporium (Petitioner here and Intervenor below) did not commit any unfair labor practice. The NLRB agreed and dismissed the complaint. The Court of Appeals reversed, remanding the case to the NLRB for reconsideration.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1973. The time for filing this Petition for Certiorari was extended to October 27, 1973. This Court has jurisdiction under 28 U.S.C. §1254(1). The Court of Appeals took jurisdiction under §10(f) of the Labor Management Relations Act.[4]

QUESTIONS PRESENTED

I. May a minority use concerted action to force its employer to bargain with it on racial matters, even though the employer has a duty to bargain exclusively with a union?

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[1] *Western Addition Community Organization v. National Labor Relations Board*, No. 71-1656 (D.C. Cir. 1973).

[2] *The Emporium*, 192 N.L.R.B. No. 19 (1971).

[3] Trial Examiner's Decision, appended to the Board's decision at 192 N.L.R.B. No. 19 (1971).

[4] 29 U.S.C. §160(f).

II. Should the NLRB become an additional forum to protect minority activities which are in derogation of, or without the sanction of, the majority representative?

III. Are otherwise unprotected activities of a minority against its employer protected by the LMRA merely because the union is arguably failing to remedy alleged discrimination by the most "expedient" and "efficacious" means?

IV. Does Title VII of the Civil Rights Act of 1964 modify the LMRA so that otherwise unprotected activities of a minority directed at racial discrimination become protected by the LMRA?

V. How can the LMRA and Title VII of the Civil Rights Act of 1964 be accommodated without destroying the exclusivity principle of the LMRA?

STATUTORY PROVISIONS INVOLVED

Section 9(a) and 7 of the Labor Management Relations Act (LMRA) are fully set out in the Appendix.

The pertinent section of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a), is set out fully in the Appendix. The Civil Rights Acts of 1870 and 1871, 42 U.S.C. §§ 1981, 1983 are set out fully in the Appendix.

STATEMENT OF THE CASE

In 1968 several department store employees complained to their Union (Local 1100) of alleged racial discrimination by their employer, the Emporium Capwell Co., the Petitioner here. The contract prohibited such discrimination. The Union agreed to, and did, investigate and prosecute their grievances.

Two of the employees disrupted the ensuing adjustment board proceedings where the union was presenting evidence in support of their individual charges of discrimination. The employees had been urged by representatives of the Equal Employment Opportunity Commission of the United States (EEOC) and the California Fair Employment Practices Commission (FEPC) to pursue the contractual grievance procedures. There was no evidence that their grievances were not being vigorously processed on an individual basis. Nevertheless, they refused to give testimony, walked out of the hearing, and as self-appointed representatives of all minorities demanded to bargain with the President of the Emporium on a group basis. They held a press conference, and engaged in picketing and handbilling, using libelous and vituperative language throughout, referring to slave conditions at the Emporium and characterizing the employer as a racist pig. Continuing their activities after two warnings, the employees were terminated.

The Trial Examiner and the NLRB held that the activities were not protected by the Labor Management Relations Act. The Court of Appeals reversed

on the grounds that the policy set forth in Title VII of the Civil Rights Act of 1964[5] modified the doctrine of exclusivity in the LMRA. Thus, the Court read Title VII[6] as giving racial minorities special rights, transcending the usual exclusive representation rights of the majority representative.

On remand the Court of Appeals would have the Board consider two questions as determinative of whether the employees' activities were protected by the LMRA: (a) ". . . whether the Union was actually remedying the discrimination to the fullest extent possible by the most expedient and efficacious means" and (b) whether the conduct of the employees was so "disloyal" as to justify the discharges.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CONFLICTS WITH DECISIONS OF THE SEVENTH AND NINTH CIRCUITS.

In 1972, the Seventh Circuit held unprotected the picketing of an employer by a minority employee protesting an alleged discriminatory failure to promote. *Moore v. Sunbeam Corp.*[7] The Court accepted the Board's view that the no-strike clause of the contract prohibited such conduct, noting the national policy favoring arbitration rather than coercive activity.

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[5] 42 U.S.C. §2000e.

[6] 42 U.S.C. §2000e-3(a).

[7] *Moore v. Sunbeam Corporation*, 459 F.2d 811 (7th Cir., 1972).

Similarly, the Ninth Circuit in *N.L.R.B. v. Tanner Motor Livery*[8] twice vacated the orders of the Board, reinstating two employees discharged for picketing their employer in protest of alleged discrimination. The Court ruled that minorities must "first ... seek action by a union majority" or otherwise their concerted activities are not protected by the LMRA.[9]

Both decisions are in clear conflict with the Court of Appeals decision in this case, which declares that Title VII creates an exception to Section 9(a) of LMRA.[10] That conflict should be resolved and, absent legislation, can only be resolved by this Court.

II. THE DECISION OF THE COURT OF APPEALS UNDERMINES A CENTRAL PRINCIPLE OF OUR NATIONAL LABOR POLICY, i.e., THE EXCLUSIVE REPRESENTATION OF EMPLOYEES BY UNIONS.

Exclusivity, of course, is plainly required by Section 9(a) of the LMRA. Employers can and must bargain exclusively with the majority representative. Exclusivity has been unswervingly applied by the NLRB for 38 years and strengthened by many decisions of this Court. That principle will be greatly impaired if the Court of Appeals Decision stands.

Exclusivity is necessary for management and unions in bargaining and in the administration of contracts. Management must know with whom to bar-

[8] *N.L.R.B. v. Tanner Motor Livery, Ltd.*, 349 F.2d 1 (9th Cir. 1964) and 419 F.2d 216 (9th Cir. 1969).

[9] 419 F.2d at 221.

[10] 29 U.S.C. §159(a).

gain and to whom it can look for finality in bargaining responsibility. Unions must sort out collective and individual rights in order to present a strong united front. Inevitably, minority interests must be subordinated to common goals.

The labor stability achieved in the American experience depends upon collective bargaining with exclusive representation, enforceable contracts, and a preference for arbitration.

By creating an exception to the principle of exclusivity in the case of minority grievances, the Circuit Court has cast doubt on the validity of established rights and duties of employers and unions. Those legal guidelines developed by 38 years of experience and case law rest upon the principle of exclusivity. It is difficult to see how the present collective bargaining system can continue without maintaining the principle of exclusive representation.

III. THE LAW IS UNCLEAR AS TO THE RIGHTS OF MINORITIES TO ENGAGE IN CONCERTED ACTIVITIES WHEN THEY ARE REPRESENTED BY A UNION. THIS COURT SHOULD CLARIFY THE RELATIONSHIP BETWEEN TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND SECTIONS 7 AND 9(a) OF THE LMRA.

The decision of the Court of Appeals for the District of Columbia states that Title VII modifies the provisions of the LMRA[11] with respect to the protected status of racial minorities engaging in concerted activities. The law remains uncertain, particu-

[11] 29 U.S.C. §157.

larly because of the conflict with the other Circuits.[12] In the absence of further legislation, only this Court can clarify the law by determining what accommodation, if any, should be made between the two Acts.[13] This Court should make that clarification.

IV. THERE IS NO NEED TO FASHION A NEW REMEDY UNDER THE LMRA SINCE THE RIGHTS OF MINORITIES ARE ADEQUATELY PROTECTED ELSEWHERE.

Numerous remedies are already available safeguarding rights of minorities in the collective bargaining context:

(a) the Civil Rights Acts of 1870 and 1871[14] and Title VII of the Civil Rights Act of 1964. (the minority employees involved in this case are plaintiffs in a pending action under the Civil Rights Acts of 1870 and 1964).[15]

(b) the Fair Employment Practices Acts of the States;

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[12]The Board and the Courts have long struggled with the rights of non-racial minorities to engage in concerted activities. The result has been a confusion among the tests to be applied and this confusion has carried over in the racial cases. See e.g., *N.L.R.B. v. Allis Chalmers Mfg. Co.*, 388 U.S. 175 (1967); *N.L.R.B. v. R. C. Can Co.*, 328 F.2d 974 (5th Cir. 1964); *N.L.R.B. v. Draper Co.*, 145 F.2d 199 (4th Cir. 1944); *Western Addition Community Organization v. N.L.R.B.*, *supra* (dissenting opinion); *United Parcel Service*, 205 N.L.R.B. No. 163 (1973) (dissenting opinion).

[13]An accommodation has been reached where the minority activity is illegal. It is not protected. *McDonnell Douglas Corp. v. Green*, ... U.S. ..... 36 L.E.2d 668, 678 (1973).

[14]42 U.S.C. §§1981, 1983.

[15]*Western Addition Community Organization v. The Emporium*, C-71-2137 CBR.

(c) grievance procedures of collective agreements;

(d) Section 9(a) protects an individual's right to process grievances without the intervention of the bargaining representative;

(e) the duty of fair representation is enforced both by the NLRB and by the Courts.[16]

There is no justification for making the NLRB yet another forum to decide such cases.

CONCLUSION

For all the above reasons, and particularly to resolve the conflict among the Circuits and to clarify the rights of minority concerted action with the requirements of exclusive representation, Petitioner prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

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Attorneys for Petitioner.

October, 1973.

(Appendix Follows)

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[16]*Cargo Handlers, Inc.*, 159 N.L.R.B. 321 (1966); *Vaca v. Sipes*, 386 U.S. 171 (1967).

Appendix

Appendix

DECISION OF CIRCUIT COURT OF APPEALS FOR DISTRICT OF COLUMBIA IN WESTERN ADDITION COMMUNITY ORGANIZATION NLRB

(OFFICIAL TEXT)

United States Court Of Appeals
for the District of Columbia Circuit

No. 71-1656

Western Addition Community Organization

vs.

National Labor Relations Board, Respondent
The Emporium Capwell Company, Intervenor
for the District of Columbia Circuit.

Decided June 29, 1973

Kenneth Hecht of the bar of the Supreme Court of California, *pro hac vice,* by special leave of Court, with whom *Edward Steinman* and *Lee M. Modjeska* were on the brief, for petitioner.

Stephen C. Yohay, Attorney, National Labor Relations Board, of the bar of the Court of Appeals of New York, *pro hac vice,* by special leave of Court with whom *Marcel Mallet-Prevost,* Assistant General Counsel, and *Abigail Cooley Baskir,* Attorney, National Labor Relations Board, were on the brief, for respondent.

George O. Bahrs was on the brief for intervenor.

Martin I. Slate, Attorney, Equal Employment Opportunity Commission, of the bar of the United States District Court for the District of Columbia *pro hac vice,* by special leave of Court with whom *Julia P. Cooper,* Chief, Appellate Section, Equal Employment Opportunity Commission, was on the brief for Equal Employment Opportunity Commission as amicus curiae urging reversal.

Before ROBINSON and MACKINNON, *Circuit Judges,* and CHARLES WYZANSKI* *Senior U.S. District Judge* for the District of Massachusetts.

Opinion for the court filed by *Circuit Judge* MACKINNON.

Dissenting opinion filed by *Senior District Judge* WYZANSKI.

Western Addition Community Organization v. N.L.R.B. No. 71-1656

MACKINNON, *Circuit Judge:* This case is before us on the petition of the Western Addition Community Organization to review an order[1] of the National Labor Relations Board which dismissed a complaint issued against the Emporium (hereinafter referred to as the Company) for alleged violations of section 8(a) (1) of the National Labor Relations Act, as amended, 29 U.S.C. § 151 et seq. (hereinafter referred

*Sitting by designation pursuant to Title 28 U.S.C. Section 294(d) (1970).

[1]The Board's decision is reported at 192 NLRB No. 19, 77 LRRM 1669 (1971).

to as the Act).[2] The Company is engaged in the operation of a retail department store in San Francisco, and was a member of a multi-employer group, the Retailer's Council, which served as its bargaining agent. The Retailer's Council, was a signatory to a collective bargaining agreement with the Department Store Employees Union (hereinafter the Union) which was the exclusive representative of the Company's employees employed in the stock and marking areas at the store. The applicable collective bargaining agreement contained an anti-discrimination clause[3] and provided that grievances arising out of the agreement "may be referred to the Adjustment Board,"[4] and possibly submitted to arbitration.[5] The agreement also contained no-strike and no-lockout clauses.

In a series of meetings in early April 1968, a group of Company employees including Tom Hawkins and James Joseph Hollins submitted to the Union representatives a list of grievances in which the employees

[2]Section 8(a)(1), 29 U.S.C. § 158(a)(1) provides:

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

[3]The clause provided:

Section 21(E), "No person shall be discriminated against in regard to hire, tenure of employment or job status by reason of race, color, creed, national origin, age or sex."

[4]Section 5(B) of the agreement provided:

Section 5 (B), "Any act of any employer, representative of the Union, or any employee that is interfering with the faithful performance of this agreement . . . may be referred to the Adjustment Board for such action as the Adjustment Board deems proper, and permissive within this agreement."

[5]The agreement provided that if after considering a submitted issue for one week the Adjustment Board was unable to reach a settlement, either party could *insist upon binding arbitration.*

contended that the Company was discriminating against racial minorities. Claiming that racial bias had caused minority employees to be denied promotions, the employees at the outset centered their complaint and specifically charged that employee Russel Young had been denied advancement solely because he was Black. Following these meetings, Union Secretary-Treasurer Walter Johnson designated a Union committee to investigate the allegations, and later that month prepared a detailed report outlining the employees' contentions which "raised . . . the possibility [not solely of Young's complaint but] of *racial discrimination.*"[6] (Emphasis added.) Shortly thereafter, Johnson presented his report to the Retailer's Council, where it was agreed that the grievances should be taken directly to the Company. Accordingly, in mid-April Johnson met with the Company labor relations manager and it was agreed that the Company "would look into" the situation and "see what they could do."[7]

In May, a group of ten employees requested an additional meeting with Johnson. The problem of racial discrimination in general and the Russel Young case in particular were again discussed, however,

[6]This report stated:

> Probably the most important matter raised was the possibility of racial discrimination. This is outlawed under the terms of the agreement and certainly again in this day and age should not be a problem. It was the general feeling of almost all present that discrimination is directed against the Negro employees and the more senior employees, senior, that is, in the point of age.

[7]Trial Examiner's Decision, appended to the Board's decision 192 NLRB No. 19, (hereinafter cited as TXD) at 3.

since Young was about to begin his summer vacation, it was agreed that further investigation of the matter should await his return.

On about September 3, Johnson again met with the employees including Hawkins and Hollins, and with representatives of the Fair Employment Practices Committee (FEPC) and the Economic Opportunity Council (EOC), and announced that the Union had considered the problem and had concluded that the Company had been acting discriminatorily. Further, the Union stated that it would demand an Adjustment Board proceeding and would insist upon arbitration if necessary. While acknowledging that arbitration was a time-consuming procedure, Johnson pointed out that the arbitration award, once achieved, would produce a "long lasting effect" which would benefit not only the employees having immediate interest in the problem, but "other people involved in it" as well.[8]

[8]Johnson further testified at the hearing before the Trial Examiner:

> [W]e wanted to process *these grievances* and *we felt that there were problems of discrimination* and it was my own personal feeling that *all the discriminatory acts should be processed and that we ought to follow through and take care of it* (A. 136).
>
> • • •
>
> [I]t was my feeling certain acts had to take place in order that *everybody* at the Emporium would have an opportunity not only to have a job, but to advance into positions (A. 137).
>
> • • •
>
> I specifically requested and pointed out that it is going to take a long time in some of these cases, but that they would not only be helping themselves, but other people involved in it, because we had very strong feelings on the question (A. 136-137). (Emphasis added.)

References are to the appendix in this case.

However, the program outlined by Johnson did not satisfy all of the employees. Some of those present expressed "frustration" with the situation and requested that the Union picket the Company's store. Johnson rejected the idea and explained that the Union was bound to seek satisfaction of grievances according to the terms of the collective bargaining agreement. He also stated that though he told the minority employees, including Hawkins and Hollins, that it was his advice that they follow the Adjustment Board and arbitration procedures, he stated that "if they wanted to take any other action they could do it as individuals and do whatever they wanted as individuals."[9] The EOC and FEPC representatives also recommended that the contract procedures be followed.

The next day Johnson wrote the general manager of the Retailer's Council requesting a meeting of the Adjustment Board to resolve the grievances discussed at the previous day's meeting. Johnson told the Council

> We specifically charge the Emporium with violations of [the anti-discrimination clause] of the Agreement between the San Francisco Retailers Council and [the Union]. We have approximately 120 pages of testimony, recorded by a court reporter to substantiate our position. We are ready to proceed to immediate arbitration if the Emporium is agreeable.[10]

In response to this letter, on October 16 a meeting was convened of the Adjustment Board.

[9]Append. at 149.

[10]TXD at 4.

As the meeting began, Union Agent Williams attempted to present evidence of the Company's practices by questioning employees regarding their individual grievances. However, he was interrupted by Hollins who, speaking for himself and three other employees[11], read a prepared statement objecting to the prosecution of grievances on an individual basis. Those employees did not want to "speak as individuals," but would act only "as a group."[12] Further, Hollins stated that the group "wanted to talk to the President of the Emporium and wouldn't talk to anybody else, since their "main purpose was to talk to the President to try to reach an agreement with him to straighten out the problems and conditions of the Emporium."[13] Then, after refusing to give any testi-

[11]The other employees were identified at Hawkins, Epps and Washington.

[12]Hawkins testified:

> The sense was that they [i.e., the Union] wanted to do something, but they wanted to go through the procedure of this retailers counciling [*sic*] and it was going to be individually when it came about when we were still talking group matters.
>
> [I]t was individual persons that would say something and on their behalf they would take it into consideration instead of a group matter that we were talking about.
>
> Q. Was this way of proceeding that the union seemed to want to follow acceptable to you?
>
> A. No, it wasn't.
>
> Q. Why not?
>
> A. Because we felt that like if we talked as individuals well, they could only have a few cases, they would satisfy a few. Like Mr. Young, he was the only one that really got something out of the deal, he got a promotion. (Append. at 48-9).

Hollins testified:

> I said that we didn't want to stay for the meeting that we didn't feel like the meeting [of the Adjustment Board] was really representing us because they wanted to take our case as an individual thing and we were fighting it as a whole, not an individual case. (Append. at 114).

[13]Append. at 13.

mony regarding individual employees' complaints, the four walked out of the meeting. A second meeting was held of the Adjustment Board two days later, but none of the four attended.[14]

Shortly thereafter, Hollins went to the Company president requesting that they "talk about a situation that [Hollins] felt should be discussed about things that were happening among minority employees at the store."[15] The Company president would not speak to Hollins, but suggested that he talk instead to the Company's personnel director. Hollins refused to talk to the personnel manager, having previously spoken to him about the situation.

Hawkins and Hollins, together with several other employees, called a press conference on October 22 which was attended by representatives of the press, radio and television. The employees stated that the Emporium was engaging in racist conduct by discriminating against racial minorities and that the employees were planning to picket the store. Hollins also read a handbill which the group intended to distribute to the public, and further stated that they "were planning on leafleting and boycotting the store because [they] felt that employees were not being treated fairly, minority employees were not being treated fairly as far as working conditions was [sic]

[14]The record is unclear as to what transpired at this meeting. The record does indicate that two minority employees were promoted by the Company in the fall of 1968 before the November picketing. TXD at 5.

[15]Append. at 121.

concerned."[16] On the following Saturday, November 2, Hollins, Hawkins and two other employees picketed the store from 9:30 a.m. to 6 p.m., distributing the following handbill to people entering and leaving the store:

BEWARE EMPORIUM SHOPPERS
BOYCOTT IS ON!!!

For years at the Emporium black, brown, yellow, and red people, have worked at the lowest jobs, at the lowest levels. Time and again we have seen intelligent hard working brothers and sisters denied promotions and basic respect.

The Emporium is a 20th century colonial plantation. The brothers and sisters are being treated the same way as our brothers are being treated in the slave mines of South Africa.

Whenever the racist pig at the Emporium injures or harms a black sister or brother, they injure and insult all black people. The Emporium must pay for these insults. Therefore, we encourage all of our people to take their money out of this racist store, until black people have full employment and are promoted justly throughout the Emporium.

We welcome the support of our brothers and sisters from the churches, union, sororities, fraternities, social clubs, Afro-American Institute, Black Panther Party, W.A.C.O. and the Poor Peoples Institute.

While the picketing was in progress, Johnson spoke with Hollis telling him that he did not want to see

[16]Append. at 82.

Hollins fired and suggested that the only way to resolve the matter was through arbitration under the collective bargaining agreement. Hollins responded that they only wanted to talk with the Company president.

On November 7 Hollins and Hawkins were called to the office of the Company's manager of labor relations and given a written warning to refrain from the picketing or possibly be fired.[17] Despite this warning, the two again picketed the store and distributed leaflets the following Saturday. Accordingly, on Monday, November 11, Hollins and Hawkins were fired.[18] The Union subsequently filed a protest with the Retailer's Council challenging the discharges of Hollins and Hawkins, though the Union did not initiate the present action.

[17]The warning message to Hollins read:

On October 22, 1968, you issued a public statement at a press conference to which all newspapers, radio, and TV stations were invited. The contents of this statement were substantially the same as those set forth in the sheet attached. This statement was broadcast on Channel 2 on October 22, 1968 and Station KDIA.

On November 2nd you distributed copies of the attached statement to Negro customers and prospective customers, and to other persons passing by in front of The Emporium.

These statements are untrue and are intended to and will, if continued injure the reputation of The Emporium.

There are ample legal remedies to correct any discrimination you may claim to exist. Therefore, we view your activities as a deliberate and unjustified attempt to injure your employer.

This is to inform you that you may be discharged if you repeat any of the above acts or make any similar public statement.

The message given to Hawkins was essentially identical.

[18]The discharge slip stated: You are being discharged today. Distribution of "Boycott Emporium" literature on Saturday, November 9, 1968, in front of the Emporium, 855 Market Street, S. F., pursuant to written warning dated 11/7/68 for similar action on 11/2/68.

On November 19, 1968 the Western Addition Community Organization filed a charge with the N.L.R.B. alleging that the Company had violated section 8(a)(1) of the Act by discharging Hollins and Hawkins. A complaint was issued and a hearing was held on April 8, 1969 before Trial Examiner William E. Spencer. He found that petitioners had engaged in "concerted activity" within the meaning of section 7 of the Act,[19] and that these actions had been based on a good faith belief that the Company was actually discriminating against racial minorities.[20] The Trial Examiner next examined whether these concerted activities lost their protection by virtue of the boycott appeal and the invective used against the Company. Though he criticized the language, and found "the potential for injury [to the Company] considerable,"[21] *he expressed no conclusion on this issue.* Finally, he examined the issue of whether the concerted activities lost their protection because they were "inconsistent with and disruptive of" the procedures for settling grievances under the collective bargaining agreement to such a degree that it "would not effectuate the policies of

[19]Section 7, 29 U.S.C. § 157 (1970), provides: Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

[20]TXD at 10.

[21]*Id.* at 13.

the Act to extend its protection to such activities."[22] The Trial Examiner found that the activities were unprotected and recommended that the complaint be dismissed. He reasoned that to protect such conduct

> would seriously undermine the right of employees to bargain collectively through representatives of their own choosing, handicap and prejudice the employee's duly designated representative in its efforts to bring about a durable improvement in working conditions among employees belonging to racial minorities, and place on the Employer an unreasonable burden of attempting to placate self-designated representatives of minority groups while abiding by the terms of a valid bargaining agreement and attempting in good faith to meet whatever demands the bargaining representative put forth under that agreement.[23]

The Board affirmed the rulings of the Trial Examiner, and adopted his findings, conclusions, and recommendations. Two members dissented.[24]

I.

Section 7 of the Act protects employees from discharge for engaging in protests against their employer's racially discriminatory practices. *N.L.R.B. v. Tanner Motor Livery, Ltd.*, 349 F.2d 1, 4 (9th Cir. 1965); *Mason-Rust*, 179 NLRB 434 (1969); *Washington State Service Employees State Council No. 18*, 188 NLRB No. 141 (1970). Such protests in favor of non-

[22] *Id.* at 9.

[23] *Id.* at 15.

[24] Members Jenkins and Brown each filed dissenting opinions.

discriminatory working conditions are "concerted activities for the purpose of collective bargaining," within the meaning of that section. Extending the protection of section 7 to such protests is but one aspect of the national labor policy which unequivocally rejects racial discrimination in employment. *See, e.g., New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938).

Another aspect of national labor policy, and certainly a central tenet of the Act's structure, is set out in section 9(a) which provides that the representatives of the bargaining unit "shall be the exclusive representatives for all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment" (emphasis added).[25]

Recently, in *N.L.R.B. v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967) the Supreme Court underscored the purpose of the exclusivity principle enunciated in section 9(a):

[25] 29 U.S.C. § 159(a) provides in full:

> (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, that any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents. . . ." Steele v. Louisville & N.R. Co., 323 U.S. 192, 202. Thus only the union may contract the employee's terms and conditions of employment and provisions for processing his grievances; the union may even bargain away his right to strike during the contract term; and his right to refuse to cross a lawful picket line. The employee may disagree with many of the union decisions but is bound by them. "The majority-rule concept is today unquestionable at the center of our federal labor policy." "The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." Ford Motor Co. v. Huffman, 345 U.S. 330, 338.

388 U.S. at 180 (footnotes omitted). *See also, J.I. Case v. Labor Board,* 321 U.S. 332 (1944).

Similarly, the legislative history of section 9(a) emphasizes that the primary purpose of giving the elected representative the exclusive right to represent all members of the bargaining unit in discussions with the employer over working conditions was to prevent the situation where two or more agreements might be negotiated by splinter groups which treated various factions of the bargaining unit unequally. The House Report summarized the purposes of section 9(a) thusly:

> The underlying purposes of the majority rule principle are simple and just. As has frequently been stated, collective bargaining is not an end in itself; it is a means to an end, and that end is the making of collective agreements stabilizing employment relations for a period of time, with results advantageous both to the worker and the employer. There cannot be two or more basic agreements applicable to workers in a given unit; this is virtually conceded on all sides. If the employer should fail to give equally advantageous terms to non-members of the labor orginzation negotiating the agreement, there would immediatedly result a marked increase in the membership of that labor organization. On the other hand, if better terms were given to nonmembers, this would give rise to bitterness and strife, and a wholly unworkable arrangement whereby men performing comparable duties were paid according to different scales of wages and hours. Clearly then, there must be one basic scale, and it must apply to all.

H.R. Rep. No. 1147 on S. 1958, 74th Cong., 1st Sess. at 20, in II *Legislative History of the National Labor*

Relations Act, 1935 (N.L.R.B. 1949) at 3069. Unequal treatment of members of the same bargaining unit could only produce bitterness, strife, and, ultimately, industrial instability—a prime target at which the Act was aimed, 29 U.S.C. § 151 (1970). Additionally, the cases have noted that the exclusivity of the bargaining representative helps to preserve an orderly procedure for collective bargaining by precluding the employer from bargaining with splinter groups. *Medo Photo Corp. v. N.L.R.B.,* 321 U.S. 678, 685 (1944).

These objectives of section 9(a) have been effectuated by provisions within the Act which restrict employers' conduct and case law which has restricted employees' conduct which interferes with that section. It is an unfair labor practice under sections 8(a)(1) and (5) of the Act for an employer to refuse to bargain with the duly elected union representative or to engage in bargaining with splinter groups. *Medo Photo Corp. v. N.L.R.B., supra.* Similarly, the rights protected by section 7, for employees to engage in concerted activity, have been held to be somewhat limited by section 9(a), though the boundaries of that limitation are by no means definite. The cases have not produced a uniform approach to determine when concerted activity by a minority of employees loses the protection of section 7 due to a conflict with the exclusivity of the bargaining representative provided by section 9(a). One approach has been to protect minority concerted activity, such as walkouts or picketing, whenever it is not in derogation of the union's

position on the matter in question, *i.e.,* when the concerted activity supports the position taken by the union. *See, e.g., N.L.R.B. v. R.C. Can Co.,* 328 F.2d 974 (5th Cir. 1964); *Western Contracting Corp. v. N.L.R.B.,* 322 F.2d 893 (10th Cir. 1963).[26]

Another approach, and now apparently more widely accepted, has been to find the minority concerted activity protected only when it is not disruptive of the concept of orderly collective bargaining, regardless of whether the activity might be deemed to be supportive of the union's position. *See, e.g., N.L.R.B. v. Tanner Motor Livery, Ltd.,* 419 F.2d 216 (9th Cir. 1969); *cf. N.L.R.B. v. Shop Rite Foods,* 430 F.2d 786 (5th Cir. 1970). In *Tanner, supra,* two employees were discharged for picketing their employer in protest over its racially discriminatory hiring practices. The two employees had not attempted to utilize their union representative to remedy the situation, and the union's position on their claims was not know (*sic*). Though the court agreed that such picketing was concerted activity within section 7, it found that section 9(a) deprived the picketing of the protection to which it would otherwise would have been entitled.

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[26] *See also,* First National Bank of Omaha v. N.L.R.B., 413 F.2d 921, 926 (8th Cir. 1969) (dictum); N.L.R.B. v. Rubber Rolls, Inc., 388 F.2d 71, 73 (3rd Cir. 1967) (dictum); Lee A. Consaul Co., 175 NLRB 547, 549 (1969), *enf. denied,* 469 F.2d 84 (9th Cir. 1972); Shop Rite Foods, Inc., 171 NLRB 1498, 1510 (1968), *modified,* 430 F.2d 786 (5th Cir. 1970); San Juan Lumber Co., 154 NLRB 1153, 1163 (1965), *enf'd.,* 367 F.2d 397 (9th Cir. 1966).

The decision in *R.C. Can, supra,* has come increasingly under attack. *See, e.g.,* Lee A. Consaul Co. v. N.L.R.B., 469 F.2d 84, 85 (9th Cir. 1972); N.L.R.B. v. Tannor Motor Livery, Ltd., 419 F.2d 216, 221 (1969); N.L.R.B. v. Shop Rite Foods, 430 F.2d 786, 790-91 (5th Cir. 1970).

The court specifically rejected the rationale of *R.C. Can, supra,* and reasoned that the concept of orderly collective bargaining could only be promoted if employees were held to have "an obligation to go to the union with their desire for non-discriminatory hiring."[27] An analogous position has been taken by a number of courts with respect to "wild cat" strikes which hold that such minority activity is so disruptive of collective bargaining that it can never be protected by section 7. *Lee A. Consaul Co. v. N.L.R.B.,* 469 F.2d 84 (9th Cir. 1972); *N.L.R.B. v. Sunbeam Lighting Co.,* 318 F.2d 661 (7th Cir. 1963); *Plasti-Line, Inc. v. N.L.R.B.,* 278 F.2d 482 (6th Cir. 1960); *Harnischfeger Corp. v. N.L.R.B.,* 207 F.2d 575 (7th Cir. 1953); *N.L.R.B. v. Draper Corp.,* 145 F2d 199 (4th Cir. 1944).

II.

With this brief discussion of section 9(a) and the cases interpreting the interplay between it and section 7, we examine the application of the exclusivity principle to the minority concerted activities in this case. We conclude that the Board's decision that these concerted activities were not protected by the Act is not supported by substantial evidence in the record and must be reversed. As our discussion below makes clear, we base this conclusion on the distinction between concerted activity involving racially discriminatory employment practices and concerted activity involving other working conditions, an analysis of the exclusivity principle, and the particular facts of this

[27] 419 F.2d at 221.

case. We recognize the important role played by the exclusivity principle in collective bargaining and feel that our decision here in no way hampers that role. In part III, *infra,* we note that on remand the Board may consider the issue of disloyalty.

A. *Concerted Activity Involving Racial Discrimination*

The right of an employee to racially non-discriminatory treatment is unquestionally (*sic*) a "condition of employment" and as such the negotiation of an anti-discrimination clause in a collective bargaining agreement is within the purview of the exclusive bargaining enunciated in section 9(a). Yet, this right to non-discriminatory treatment differs significantly from other "conditions of employment" which are also the subject of exclusive bargaining, such as pension benefits or seniority rights. The right to be free of racially discriminatory employment practices does not depend upon the presence of an anti-discrimination clause in a collective bargaining agreement, but is firmly rooted in the law. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.; United Packinghouse Workers Union v. N.L.R.B.,* 135 U.S. App. D.C. 111, 416 F.2d 1126, *cert. denied,* 396 U.S. 903 (1969). Even in the absence of such a clause in a collective bargaining agreement, an employer would be equally restrained from engaging in such practices.[28]

[28] Similarly, any analysis of whether concerted activity in protest over racial discrimination in employment was protected *vel non* in light of section 9(a) cannot turn on the fact that the collective bar-

Not only does concerted activity involving racial discrimination have a unique status in that the subject matter has independent statutory bases, but section 704(a) of Title VII precludes an employer from discharging employees in retaliation for peaceful picketing of the employer's business in protest of allegedly discriminatory racial practices,[29] *Cf. Green v. McDonnell-Douglas Corp.*, 463 F.2d 337, 341 (8th Cir. 1972), *aff'd*, 41 *U.S.L.W.* 4651 (U.S., May 14, 1973). Where, as here, both the subject matter of the concerted activity and the right to engage in such activity are safeguarded by legislation, we feel such concerted activity cannot be treated identically with other concerted activity which is not so safeguarded for the purpose of determining whether it so violated section 9(a) as to loose section 7 protection.

Neither the Trial Examiner nor the Board took cognizance of the statutory bases of the rights involved in their evaluation of the undermining effect of these concerted activities to section 9 (a).[30] While these ac-

gaining agreement contained an anti-discrimination clause. *See* N.L.R.B. v. Tanner Motor Livery, Ltd., 419 F.2d 216, 221 (9th Cir. 1969). We assume that even in the absence of such a clause, section 7 activity would be equally restrained by section 9(a)—whatever the extent of that limitation might be.

[29]42 U.S.C. § 2000e-3(a) (1970) provides:

> (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he had made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

[30]Both dissenting members criticized the Board for not considering the legislative policies embodied in Title VII. 192 NLRB No. 19 at 17, 23.

tivities are the subject of review by the Board only because they are deemed to be "concerted activities" within section 7 and also involving "conditions of employment" within section 9 (a), the Board has an obligation in construing the acts which it administers to recognize, and sometimes reconcile, co-existing and perhaps inconsistent policies embodied in other legislation. As the Supreme Court noted in *Southern Steamship Co. v. N.L.R.B.*, 316 U.S. 31, 47 (1942):

> [T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

See also, Textile Workers v. Lincoln Mills, 353 U.S. 448, 456-58 (1958); *cf. McLean Trucking Co. v. United States*, 321 U.S. 67, 79-80 (1944)[31]; *Northern Natural*

[31]*In McLean Trucking Co., supra*, the Supreme Court stated:

> To secure the continuous, close and informed supervision which enforcement of legislative mandate frequently requires, Congress has vested expert administrative bodies such as the Interstate Commerce Commission with broad discretion and has charged them with the duty to execute stated and specific statutory policies. That delegation does not necessarily include either the duty or the authority to execute numerous other laws. Thus, here, the Commission has no power to enforce the Sherman Act as such. It cannot decide definitively whether the transaction contemplated constitutes a restraint of trade or an attempt to monopolize which is forbidden by that Act. The Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems. That legislation constitutes the

Gas Co. v. F. I. C., 130 U.S. App. D.C. 220, 226-28, 399 F.2d 953, 959-61 (1963).

Thus, the Board should have recognized that in light of Title VII, concerted activity involving racial discrimination is quite distinct from other concerted activity.

B. *Interference with Section 9(a)*

As we noted previously,[32] the exclusivity principle enunciated in section 9(a) of the Act was premised on the concept of majority rule. This concept—that what was best for the union was best for the individual—recognized that collective bargaining could not proceed where various factions within the bargaining unit were free to present conflicting or unequal demands to the employer. Subjection of the will of the individual to the will of the majority was the method Congress chose to preserve industrial peace and stability over matters in which individuals would most likely dis-

immediate frame of reference within which the Commission operates; and the policies expressed in it must be the basic determinants of its action.

But in executing those policies the Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. When this is true, it cannot, without more, ignore the latter. The precise adjustments which it must make, however, will vary from instance to instance depending on the extent to which Congress indicates a desire to have those policies leavened or implemented in the enforcement of the various specific provisions of the legislation with which the Commission is primarily and directly concerned. Cf. National Broadcasting Co. v. United States, 319 U.S. 190; New York Central Securities Corp. v. United States, 287 U.S. 12.

321 U.S. at 79-80 (emphasis added).

[32] *See* part 1, *supra*.

agree. However, on the issue of whether to tolerate racial discrimination in employment the individuals in a union cannot legally disagree. The law does not give the union an option to tolerate *some* racial discrimination, but declares that *all* racial discrimination in employment is illegal. 42 U.S.C. § 2000e-2 (1970).[33] Therefore, the underlying premise of section 9(a) that the will of the individual must be subjected to the will of the majority does not authorize the approval of racially discriminatory employment practices, because the purposes of the minority group and the union in desiring to eradicate racial discrimination in employment cannot be at odds. Accordingly, concerted activity involving racial discrimination involves other factors than the major premise that underlies section 9(a).

While concerted activity over actual racial discrimination differs significantly from concerted activity over other working conditions and does not defeat the underlying premise of section 9(a), nonetheless we recognize that such activity as was engaged in here

[33] 42 U.S.C. §2000e-2(a) (1970) provides:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

does interfere to a certain extent with the collective bargaining process. In abandoning the grievance procedures and seeking to bargain[34] on their own, the picketers here rendered essentially ineffective the method of remedying grievances chosen by their collective bargaining representative and provided by the collective bargaining agreement.[35] We cannot agree with the Board, however, that this limited interference *alone* is sufficient to remove these concerted activities here from the protection of the Act.

First, we note that petitioners did not immediately proceed to settle their dispute with the Company over racial discrimination on their own, but utilized the procedures provided by the collective bargaining agreement for several months. Thus, the situation was quite different, and less disruptive of collective bargaining, than the one confronted by the Ninth Circuit in *Tanner, supra,* where no attempt had been made to utilize the union representative or the contract procedures before engaging in minority concerted activity. We agree with *Tanner* that even when racial issues are at stake, one should be required to submit such disputes first to the union before one resorts to minority concerted activity.[36]

[34]Petitioners argue that they only wanted to "talk" with the Company's president and "discuss" the situation. They dispute the Trial Examiner's finding that Hawkins and Hollins activities were "no mere presentation of a grievance, but nothing short of a demand that [the Company] bargain with the picketing employees for the entire group of minority employees." TXD at 14. However, we can see no reason to disturb this finding.

[35]We can find nothing in the collective bargaining agreement that would have prevented the Union from proceeding on a class basis, representing all minority employees, but the method of procedure would have still required essentially the presentation of evidence with respect to individual employees.

Without such a requirement, parties aggrieved by racially discriminatory employment practices would have little incentive to use the grievance procedures in the agreement, and certainly national labor policy favors the use of grievance-arbitration procedures to settle labor disputes, *see, e.g., Boys Markets, Inc. v. Retail Clerks Union,* 398 U.S. 235, 242-43 (1970), even when they involve racial discrimination. Though the exact role of grievance-arbitration procedures in enforcing rights created by Title VII is presently the subject of considerable dispute: *see Meltzer, Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination,* 39 U. CHI. L. REV. 30 (1971), we think grievance-arbitration procedures can play an important role in remedying racial discrimination in employment and should be encouraged. *See, e.g., Hutchings v. U.S. Industries,* 428 F.2d 303, 309 (5th Cir. 1970).[37]

Second, we find it significant that the Union and the petitioners were *not* working at cross-purposes,

[36]We note that an employee has not been required to resort to contract grievance procedures, however, before maintaining a Title VII action. Parmer v. Nat. Cash Register Co., 346 F.Supp. 1043, 1049 (S.D. Ohio 1972); Evans v. Local Union 2127, 313 F. Supp. 1354, 1358 (N.D. Ga. 1969); Bremer v. St. Louis S. W. R. R., 310 F. Supp. 1333, 1337-38 (E.D. Mo. 1969); King v. Georgia Power, 295 F. Supp. 948 (N.D. Ga. 1968).

[37]*See also, Gould, Labor Arbitration of Grievances Involving Racial Discrimination,* 118 U.PA.L.REV. 40 (1969).

but were both attempting to eradicate racially discriminatory employment practices.[38]

There was no disruption of orderly collective bargaining in the sense that a minority of employees were not attempting here to speak for the majority as in the case where a minority group engages in a "wildcat" strike during company-union negotiations in an attempt to express a rejection of a company offer. *See, e.g., N.L.R.B. v. Sunbeam Lighting Co.,* 318 F.2d 661 (7th Cir. 1963). Third, we note that after pursuing their grievances on an individual basis for several months, petitioners asked their elected representative to proceed on a "group" basis,[39] *i.e.,* to represent all minority employees affected by the alleged discrimination. The Union declined to change its pending complaint to proceed on a "group" basis. At this point petitioners abandoned the pending grievance procedure which had been initiated on their behalf and engaged in concerted activity allegedly on behalf of all minority employees. We think these facts indicate that though the immediate adjustment board proceedings were disrupted, this disruption cannot wholly destroy the protection afforded these employees by section 7, especially in light of the express protection mandated by Title VII and the limited interference with section 9(a).

[38]Indeed, if the Union were not working to eradicate racially discriminatory employment practices, it would not only be violating its statutory duty of fair representation, Vaca v. Sipes, 386 U.S. 171, 182 (1967), but also committing an unfair labor practice, *see, e.g.,* Local 12, United Rubber Workers v. N.L.R.B., 368 F.2d 12 (5th Cir. 1966), *cert. denied,* 389 U.S. 837 (1967).

[39]*See* note 12, *supra.*

There is nothing in the record before us to indicate that the union's decision to remedy the charges of discrimination by proceeding on an individual rather than a group or class basis was made in bad faith.[40] The union may well have thought it had chosen the most efficacious method to handle the charges, and it may have done so. Nonetheless, it might be that these charges could have been handled on a group or class basis. Had the union's decision to process only individual grievances been made to delay the ultimate eradication of discrimination, or been motivated by similar bad faith considerations, clearly it would have breached its duty of fair representation of all of its members. *See, e.g., Ford Motor Co. v. Huffman,* 345 U.S. 330 (1953); *Steele v. Louisville & Nashville R.R.,* 323 U.S. 192 (1944); *Tunstall v. Brotherhood of Locomotive Firemen,* 323 U.S. 210 (1944). Under such circumstances a union's decision to proceed on an individual basis could not, in our view, prevent a minority from attempting to proceed by means of another alternative method. Yet, even where the might be no bad faith on the part of the union, we recog-

[40]The record contains a number of uncontradicted references to the fact that the union was proceeding on an individual basis. However, it also appears that the union charged the employer with "racial discrimination" and alleged broad violations in the April 11, 1968 Report (General Counsel Ex. 7, Tr. 190-194). Thus, regardless of the nomenclature used, it may well be that the union was bringing all the charges that were supported by evidence. Whether this constituted proceeding on an individual basis or some other broader basis is impossible for us to determine. We recognize that a "group" action must necessarily depend upon a number of individual cases. The important consideration is not how the proceeding might be characterized but whether the union is proceeding against *all* discrimination.

nize that the method chosen by a union might not be the most efficacious or expedient.

For example, the union might be vigorously processing individual grievances before an adjustment board, while it would be more efficient and thus preferable for it to be attempting to engage in collective bargaining negotiations with the employer for all minorities to eliminate all the discriminatory employment practices. In such a case, we do not think the method or means chosen by the union should preclude a minority group who have reasonable grounds for believing that the union is not proceeding against all discrimination from attempting to assert their claim of racial discrimination in a manner which they consider would be more successful. Otherwise, as Member Jenkins observed in dissent, a union "would [be] permit[ted] . . . to control the scope, direction, pace and degree of racial discrimination."[41] We agree that the eradication of racial discrimination in employment cannot be subjected to such a restriction. Thus, the Labor Board should inquire, in cases such as this, whether the union was actually remedying the discrimination to the *fullest extent possible by the most expedient and efficacious means.* Where the union's efforts fall short of this high standard, the minority group's concerted activities cannot lose its section 7 protection.

The Trial Examiner reasoned that orderly collective bargaining would be undermined by protecting

[41]192 NLRB No. 19, slip op. at 11.

this concerted activity because it would impose upon the Company "an unreasonable burden" of having to bargain with appellants while, at the same time, dealing with the Union representative in the grievance procedure.[42] Certainly collective bargaining must be orderly in the sense that no stable, meaningful agreement can be reached where various factions are free to make conflicting demands upon an employer. The avoidance of such a state of affairs, as we have noted, was the prime motivation behind the exclusivity principle of section 9(a).[43] We can see nothing in that principle, however, which indicates that it was intended to be used as a shield to protect an employer from the "burden" of having to deal with two groups on the same subject. We cannot agree that any inconvenience which the Company might experience in being required to bargain with the minority here while still participating in the grievance procedures justifies withdrawing section 7 protection from these concerted activities.

III.

On remand the Board may consider the issue of whether the picketing of these employees, considering the language used, was so disloyal to their employer as to remove them from the protection of section 7. *N.L.R.B. v. Local Union No. 1229 (Jefferson Standard),* 346 U.S. 464 (1953). Neither the Board nor the Trial Examiner decided this issue, though the

[42]TXD at 15.

[43]See pp. 8-11, *supra.*

latter discussed it at considerable length.[44] While we do not express any opinion on the merits of this issue, we note that in considering it on remand the Board should closely examine the facts to ensure that neither racial discrimination nor adversity toward these concerted activities motivated the Company in its decision to discharge the employees. As the Supreme Court observed in *Jefferson Standard, supra:*

> The legal principle that insubordination, disobedience or disloyalty is adequate cause for discharge is plain enough. The difficulty arises in determining whether, in fact, the discharges are made because of such a separable cause or because of some other concerted activities engaged in for the purpose of collective bargaining or other mutual aid or protection which may not be adequate cause for discharge.

346 U.S. at 475. Such a factual determination is especially important here because any discharge which was racially motivated would be an unfair labor practice, *United Packinghouse Workers Union v. N.L.R.B.,* 135 U.S. App. D.C. 111, 416 F.2d 1126, cert. denied, 396 U.S. 903 (1969); moreover any discharge due solely to the employer's objection against lawfully protesting his allegedly discriminatory employment practices would be unlawful. *N.L.R.B. v. Tanner Motor Livery, Ltd.,* 349 F.2d 1 (9th Cir. 1965).[45]

[44]TXD at 11-13.

[45]Title VII also recognizes that an employee may be properly discharged for engaging in disloyal conduct, if that is the real cause of the discharge. However, the discharge would be unlawful, and the employee subject to reinstatement, if it were due to the fact that the employee had opposed certain employment practices

For these reasons the decision and order of the Board are reversed and remanded to the Board for further proceedings consistent with the opinion.

Judgment accordingly.

WYZANSKI, *Senior District Judge,* dissenting: I regret my view of the facts and the law differ in some respects from my brethren's excellent opinion. As I

made illegal by Title VII. 42 U.S.C.A. § 2000e-5(g) (1972 Supp.) provides:

> (g) if the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice) or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay. If such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged *for any reason other than discrimination* on account of race, color, religion, sex, or national origin or in violation of section 2000-3(a) of this title (Emphasis added.)

Section 2000e-3(a) provides:

> (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor

see it, we have enough to decide unequivocally the question whether the NLRB properly concluded that the Emporium Capwell Co. did not violate Section 8(a)(1) of the National Labor Relations Act when it discharged employees James Joseph Hollins and Tom Hawkins.

This case is before the Court on the petition of the Western Addition Community Organization (hereinafter referred to as the Petitioner") to review an order of the National Labor Relations Board, issued July 22, 1971, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, et seq.), dismissing a complaint issued against The Emporium Capwell Co. (hereinafter referred to as the "Company"). The Board's Decision and Order is reported at 192 NLRB No. 19. This Court has jurisdiction under Section 10(f) of the Act.

Tom Hawkins and James Joseph Hollins were employees of the company from June 1966, and November 1967, respectively, until their discharge on November 11, 1968. The Company is engaged in the operation of a retail department store at 835 Market Street, San Francisco, California. At all material

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organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

times the Company was a member of a multi-employer group, the Retailer's Council, which served as its bargaining agent, and, as such, was signatory to a collective bargaining agreement with the Department Store Employees Union (hereinafter the "Union") which was the exclusive representative of the Company's employees employed in the stock and marking areas at the store. The applicable collective bargaining agreement provided, inter alia:

> Section 21(E), "No person shall be discriminated against in regard to hire, tenure of employment or job status by reason of race, color, creed, national origin, age or sex.
>
> * * *
>
> Section 5(B), "Any act of any employer, representative of the Union, or any employee that is interfering with the faithful performance of this agreement . . . may be referred to the Adjustment Board for such action as the Adjustment Board deems proper, and permissive within this agreement."

The agreement also provided that if, after considering a submitted issue for one week, the Board was unable to reach a settlement, either party could insist upon binding arbitration. Also, the agreement contained no-strike and no-lockout clauses.

In a series of meetings in early April 1963, a group of Company employees, including Hawkins and Hollins, submitted to Union representatives a list of grievances in which the employees contended that the Company was discriminating against racial minorities. Claiming that racial bias had caused minority em-

ployees to be denied promotions, the employees specifically charged that employee Russel Young had been denied advancement solely because he is black. Following these meetings, Union Secretary-Treasurer Walter Johnson designated a union committee to investigate the allegations, and later that month prepared a detailed report outlining the employees' contentions which stated, *inter alia:*

> Probably, the most important matter raised was the possibility of racial discrimination. This is outlawed under the terms of the agreement and certainly again in this day and age should not be a problem. It was the general feeling of almost all present that discrimination is directed against the Negro employees and the more senior employees, senior, that is, in the point of age.

Shortly thereafter, Johnson presented his report to the Retailers Council, where it was agreed that the grievances should be taken directly to the Company. Accordingly, in mid-April, Johnson met with Company labor relations manager Paul Ehrenfried and it was agreed that the Company "would look into" the situation and "see what they could do."

In May, a group of ten employees requested an additional meeting with Johnson. The problem of racial discrimination in general and the Russel Young case in particular were again discussed; however, since Young was about to begin his summer vacation, it was agreed that further investigation of the matter should await his return. On about September 3, Johnson again met with the employees, including Hawkins and Hollins, and with representatives of the Fair

Employment Practices Committee ("FEPC") and the local Economic Opportunity Council ("EOC"), and announced that the Union had considered the problem and had concluded that the Company had been acting discriminatorily, and that, in accordance with its contract with the Retailers Council, the Union would demand an Adjustment Board proceeding and would insist upon arbitration if necessary. While acknowledging that arbitration was a time-consuming procedure, Johnson pointed out that the arbitration award, once achieved, would produce a "long lasting effect" which would benefit not only the employees having immediate interest in the problem, but "other people involved in it" as well. As he explained at the hearing:

> [W]e wanted to process these grievances and we felt that there were problems of discrimination and it was my own personal feeling that all the discriminatory acts should be processed and that we ought to follow through and take care of it.
>
> * * *
>
> [I]t was my feeling certain acts had to take place in order that everybody at the Emporium would have an opportunity not only to have a job, but to advance into new positions.
>
> * * *
>
> I specifically requested and pointed out that it is going to take a long time in some of these cases, but that they would not only be helping themselves, but other people involved in it, because we had very strong feelings on the question.
>
> * * *

> I came to the conclusion after the meeting we had in April that there was a serious situation that developed and it had to be taken care of.

However, the program outlined by Johnson did not satisfy all of the employees; thus, some of those present expressed "frustration" with the situation and proposed that the Union picket the Company's store. Johnson rejected the idea and in an exchange with Hollins explained that the Union was bound to seek satisfaction of grievances according to the terms of its contract and thus could not engage in "dramatic" protests such as boycotts. Johnson further stated that while individual employees "could take whatever action they wanted so long as it was legal," it was the Union's advice that they follow an "orderly legal procedure." The EOC and FEPC representatives supported Johnson's position.

The next day, Johnson wrote Vincent Brown, general manager of the Retailer's Council, requesting a meeting of the Adjustment Board to resolve the grievances discussed at the previous day's meeting, asserting, *inter alia:*

> We specifically charge the Emporium with violations of Section 5(B) and 21(E) of the Agreement between the San Francisco Retailers Council and [the Union]. We have approximately 120 pages of testimony, recorded by a court reporter to substantiate our position.
>
> We are ready to proceed to immediate arbitration if the Emporium is ready.
>
> * * *

In response to this letter, a meeting of the Adjustment Board was convened on October 16. Accordingly, the Union in consultation with counsel prepared its position for presentation to the Board.

As the meeting began, Union Agent Williams attempted to present evidence of the Company's practices by questioning employees regarding their individual grievances. However, he was interrupted by Hollins who, acting as spokesman for himself and employees Hawkins, Epps and Washington, read a prepared statement objecting to the prosecution of grievances on an individual rather than a group basis and stating that these four employees would not "speak as individuals," but would act only "as a group." Further, Hollins stated that the group "wanted to talk to the President of the Emporium and wouldn't talk to anybody else," since their "main purpose was to talk to the President to try to reach an agreement with him to straighten out the problems and conditions of the Emporium." Then, after refusing to give any testimony regarding individual employees' complaints, Hollins, Hawkins, Epps, and Washington walked out of the meeting.

A second meeting of the Adjustment Board was held on October 18, but none of the group of four attended. The record is unclear as to what transpired at the meeting; however, Hawkins did acknowledge in his testimony at the hearing in this case that through the Union's intervention, Russel Young was promoted to the position of First Assistant Manager, and Fata, another employee, was also promoted to a supervisory position.

Thereafter, in accordance with the group's stated intentions, Hollins went to Company President Batchelder insisting that they "talk about a situation that [Hollins] felt should be discussed about things that were happening among minority employees at the store." Batchelder would not speak with Hollins but suggested that Hollins discuss the situation with Henderson, the Company's personnel director. Hollins refused.

On October 22, Hawkins and Hollins, together with several other employees, called a press conference at the Sun-Reporter Building in San Francisco which was attended by representatives of the press, radio, and television. The employees stated that the Emporium was engaging in racist conduct by discriminating against racial minorities and that the employees were planning to picket the store. Hollins also read the contents of a handbill which the group intended to distribute to the public (see below) and stated that their objective was "to try to talk to the top management to get better conditions for the Emporium."

Then, on the following Saturday, November 2, employees Hollins, Hawkins, Epps and Washington picketed the store from 9:30 a.m. to 6 p.m., distributing the following handbill to people entering or leaving the store:

BEWARE EMPORIUM SHOPPERS
BOYCOTT IS ON ! ! !

For years at the Emporium black, brown, yellow, and red people, have worked at the lowest jobs, at the lowest levels. Time and again we have seen intelligent hard working brothers and sisters denied promotions and basic respect.

The Emporium is a 20th century colonial plantation. The brothers and sisters are being treated the same way as our brothers are being treated in the slave mines of South Africa.

Whenever the racist pig at the Emporium injures or harms a black sister or brother, they injure and insult all black people. The Emporium must pay for these insults. Therefore, we encourage all of our people to take their money out of this racist store, until black people have full employment and are promoted justly throughout the Emporium.

We welcome the support of our brothers and sisters from the churches, union, sororities, fraternities, social clubs, Afro-American Institute, Black Panther Party, W.A.C.O. and the Poor People's Institute.

While the picketing was in progress, Johnson told Hollins that he did not want to see him fired and that the only way to resolve the matter was through arbitration. Hollins ignored Johnson's suggestion and again stated that "the only one they wanted to talk to was Mr. Batchelder."

On November 7, Hollins and Hawkins were called to the office of Paul Ehrenfried, manager of labor relations, and given a formal written warning which

stated as follows with respect to the press conference of October 22 and the handbill of November 2:

> These statements are untrue and are intended to and will if continued injure the reputation of the Emporium.
>
> There are ample legal remedies to correct any discrimination you may claim to exist. Therefore, we view your activities as a deliberate and unjustified attempt to injure your employer.
>
> This is to inform you that you may be discharged if you repeat any of the above acts or make any similar public statements.

Nevertheless, on the following Saturday, November 9, Hollins and Hawkins again picketed the Emporium and distributed leaflets substantially identical with those distributed the previous week.

Accordingly, on Monday, November 11, Hollins and Hawkins were called to Ehrenfried's office and were discharged. Each was given a discharge slip which bore the notation:

> You are being discharged today. Distribution of "Boycott Emporium" literature on Saturday, November 9, 1968, in front of the Emporium, 855 Market Street, S.F., pursuant to written warning dated 11/7/68 for similar action on 11/2/68.

The Union subsequently filed a protest with the Retailer's Council on the discharge of Hawkins and Hollins.

November 19, 1968 Western Addition Community Organization, acting for Hawkins and Hollins, filed with the NLRB a charge that Emporium had violated

the NLR Act by discharging them for engaging in statutorily-protected concerted activities, and that those discharges constituted unfair labor practices within the meaning of Section 8 (a) (1) of the Act. The NLRB issued a complaint. After hearing before an NLRB Trial Examiner, he recommended dismissal of the complaint. On review, the Board dismissed the complaint, solely on the ground that the activities of Hollins and Hawkins were not protected because they were in derogation of the right of exclusivity of representation conferred upon the union by Sections 8 and 9 of the Act. That dismissal is the subject of the petition filed in this court by Western Addition Community Organization.

Essentially the question here preserved is whether after the employees in a collective bargaining unit have selected a representative in accordance with § 9 of the NLR Act those in a minority are free to bargain with their employer concerning class conditions of alleged racial discrimination within that unit. As the ensuing discussion indicates, attempts to avoid the direct thrust of that issue seem to be, in at least this case, exercises in futility or postponement. The essential question cannot be properly evaded or escaped by pretending that here we are dealing with individual grievances of single employees rather than working conditions of a group of employees, or that here we have a minority of employees who are not acting in derogation of the authority of their union representative. What this case requires this court to face is whether, in the light of the special aspects of

the problem of potential racial discrimination, to which both the generalities of the United States Constitution and the specifics of such Civil Rights Acts as Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq. are addressed, there is created an exception to the usual rule of exclusivity of bargaining rights conferred by the NLR Act upon a union selected by a majority of employees in an appropriate unit. This initially presents a matter of statutory construction of the NLR Act, although, if that is not resolved favorably to the petitioner, there lurks in the background a possible question as to whether insofar as it purports to give the representative selected by a majority a power to stand athwart a minority's claim to the right to seek racial nondiscriminatory conditions, the NLR Act violates the Fifth, Thirteenth, and Fifteenth Amendments to the United States Constitution, inasmuch as then the Act might be regarded as perpetuaring (*sic*) the consequences of slavery, buttressing racial discrimination, and denying due process of law.

In the case at bar the facts as viewed by the NLRB make it plain that Hollins and Hawkins sought to present to the management of Emporium not their personal grievances, such as their individual failure to be accorded their due under the collective bargaining agreement, or such as the adjustment of some wholly individual complaint. What those two men wanted was a change in management's policies in promoting, hiring, and otherwise treating that class of workers within the unit who were not white in

color. Cf. *NLRB v. Tanner Motor Livery, Ltd.*, 9th Cir., 1969, 419 F. 216, 218; *Brown v. Sterling Aluminum Products Corp.*, 8th Cir., 1966, 365 F. 2d 651, 657. There could not be a plainer instance of an attempt to bargain respecting working conditions, as distinguished from an adjustment of grievances.

Nor can it validly be claimed that on this record Hollins and Hawkins were not acting in derogation of the union representative selected by a majority, but rather were acting to supplement, support, and make more explicit the application of the bargaining contract theretofore negotiated by that union representative. To be sure, the contract, theretofore negotiated, provided that the employer should not discriminate racially. However, fairly construed, that glittering generality was, according to the contract, to be vindicated, if necessary, by a procedure of specific complaints made by the union representative and by him presented through the grievance and arbitral machinery. This the union clearly saw, and its officials were themselves quite unwilling to press for any broad assault on the employer to concede on some group basis that it should adopt a different policy of promoting or hiring colored persons. While there is a shade of ambiguity as to the union's attitude toward having such an assault made by Hollins and Hawkins, the union neither welcomed nor encouraged the steps Hollins and Hawkins took to get the employer to change its policies. It may be that the record does not show that the union interposed a firm veto. Yet we are not so unsophisticated as not to

appreciate why this evidence is not and probably never would be available. We recognize that the union could have reasons which it might not choose to proclaim from the housetops why it did not want anything approaching what it might regard as a policy of employment based on affirmative measures to achieve racial balance. Whether Hollins and Hawkins had as ultimate goals affirmative quotas for blacks, or some method of achieving in the Emporium store a racial balance corresponding to the racial balance provided by judicial decrees as a remedy in certain public employment and in certain school cases, it is no secret that what was here sought would be in derogation of the union in at least two ways. In the most obvious way it would represent a political victory for Hollins and Hawkins which would certainly not add to, and almost surely would detract from, the political appeal of the present union officers at the next election of representatives by the employees in the relevant unit; and which, long before the election, would detract from the union's glamor. More important, if Hollins and Hawkins succeed in their efforts to have the employer change its policies some whites now employed and others who might be employed will be potential losers. If a black man is promoted or hired, it is inevitable that a white will not be promoted or hired for the same job. Thus Hollins and Hawkins are acting in derogation of the union, its contract, and many of its members.

Yet this case is not to be disposed of merely by uncovering its bare bones and ripping off the veils

in which it has been wrapped that is, the pretense that this is not an effort to change working conditions in the unit, and the further pretense that this effort is not in derogation of the representative selected by a majority in accordance with Section 9 of the NLR Act. We must recognize that this is not, except most superficially, analogous to a case wherein a minority within an appropriate unit seeks, without the consent of the representative selected by a majority, to get different wages, (See Archibald Cox, *The Right To Engage In Concerted Activities,* (1951) 26 Indiana Law Journal 320), or seeks to reach agreement more quickly than the representative has done, (Cf. *NLRB v. Draper Corp.,* 4th Cir., 1944, 145 F. 2d 199, 156 A. L. R. 989; *NLRB v. Sunset Minerals, Inc.,* 9th Cir., 1954, 211 F. 2d 324,) or seeks the same results with the acquiesence (*sic*), expressed or implied, of the representative selected by the majority, (Cf. *NLRB v. R. C. Can Co.,* 5th Cir., 1964, 32 F. 2d 974-978-979), or, let us say, purely hypothetically, seeks to get better working conditions for members of a fraternal organization, or quicker promotion for workers who have been graduated from institutions of advanced education, or even claims that skilled workers in the union ought to be differently treated from unskilled workers. See William B. Gould; *The Status of Unauthorized And 'Wildcat' Strikes Under The National Labor Relations Act* (1967) 52 Cornell L. Q. 672, 686.

What this case involves is a racial issue. Racial issues in our society are, because of the United States Constitution, because of the history, traditions and

aspirations of our people, and because of the legislation of Congress, most particularly Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq., in quite a different category from other issues presented by a minority in a unit which has selected a representative in accordance with § 9 of the Act.

A first, and by no means trivial, reason why the employer, the union, the NLR Board, and we are required to treat differently a complaint as to a working condition with racial character is that, as shown by Title VII of the Civil Rights Act of 1964, 42 U.S. C. § 2000(e) et seq., and by cases such as *Griggs v. Duke Power Co.* 1971, 401 U.S. 424, it is part of our national policy, declared in Acts of Congress, not merely that an employer shall avoid the prejudice inherent in discriminating negatively by refusing to hire or promote black persons, but that an employer shall take affirmative steps to assure that black persons have equality of opportunity for employment and promotions. See *Castro v. Beecher,* D. Mass. 1971, 334 F.Supp. 930, aff'd. with modifications by 1st Cir., 1972, 459 F. 2d 725, and particularly the opinions of the District Court on remand, April 15, 1973. The NLR Act contemplates that the NLRB and all others concerned with the Act shall enforce that policy together with the policy of non-discrimination against employees on account of their legitimate union activities. This is the fair implication of *Southern Steamship Co. v. NLRB,* 1942, 316 U.S. 311.

There is a second and more subtle reason why a racial complaint must be looked upon differently from

the run-of-the-mill complaints made by minorities as to everything from wages to drinking fountains. When the minority consists of non-whites who seek for themselves what they regard as equality of opportunity, it is to be expected that their position is, if not hostile to, or at least uncongenial to, certainly not fully shared by, a majority of whites in the same unit. Even if we assume that the whites are tolerant nay generous, their short-term interest is in conflict with the short-term interest of the non-whites. Nothing—except perhaps a philosophy founded upon long-term interests—can eliminate that basic conflict. Hence it is essentially a denial of justice to allow the white majority to have the power to preclude the non-whites from dealing directly with the employer on racial issues, whether or not this is in disparagement of the rights of the union representative. See John Rawls, *A Theory of Justice,* Harvard University Press (1971) pp. 228-234; Sir Isaiah Berlin, *Two Concepts of Liberty,* Oxford University Clerendon Press (1958), pp. 9-14, 48-57.

This inevitable conflict makes it necessary either to construe legislation so as to avoid an obvious injustice, or, in the last resort, if such construction is not permissible, to face up to the ultimate Constitutional question in the spirit so perceptively adumbrated in the now classic fourth footnote in *U. S. v. Carolene Products Co.,* 1938, 304 U.S. 144, 152-153.

Fortunately, here there is no insuperable difficulty in construing the NLR Act to permit a minority, (despite the previous selection by a majority of a

representative of the unit in which the minority is employed, and despite a collective bargain executed by that representative and the employer) to bargain directly with the employer in regard to racial issues which affect that minority in a way different from the way they affect the majority. A meticulous reading of the history of the NLR Act makes this point evident. When, as Solicitor General, the Honorable Stanley Reed argued before the Supreme Court that the NLR Act was constitutional, he sought to explain the object of giving exclusivity to the representative. See 75th Cong., 1st Sess., Senate Document No. 52, Arguments In The Cases Arising Under The Railway Labor Act And The National Labor Relations Act Before The Supreme Court of The United States, February 8-11, 1937, pp. 37-38. He had made the same point, somewhat more precisely, earlier in the week in footnote 35a in the brief he had filed in *The Virginian Railway Co. v. System Federation No. 40,* 1937, 300 U.S. 515, 536-537, a companion case involving the cognate Railway Labor Act. What Mr. Reed's brief said, Mr. Justice Stone's opinion in *The Virginian Railway* case, just cited, incorporated with great specificity into the Railway Labor Act. See 300 U.S. 548, footnote 6, and Mr. Chief Justice Hughes' opinion in *National Labor Relations Board v. Jones & Laughlin Co.,* 1937, 301 U.S. 1, 44 incorporated with somewhat more generality into the National Labor Relations Act.

What is undeniable (as the discerning opinion of Circuit Judge John R. Brown in *NLRB v. R. C. Can*

Co., 1964, 328 F. 2d, 974, 979, joined in by Circuit Judge Elmer Tuttle, emphasizes, and as *Vaca v. Sipes,* 1967, 386 U.S. 171 and Note *Individual Control Over Personal Grievances under Vaca v. Sipes,* 77 Yale L. J. 559 (1968) seem to recognize) is that the draftsmen of the NLR Act, those who championed it in argument before the Supreme Court, and that court itself had their focus on the chaos that would occur, the breakdown of the union's authority, the unfortunate predicament of an harassed employer, and the likely breach of industrial peace which would occur if every dissident group of workers in an appropriate unit was free to negotiate all the terms of its own working conditions with the employer. However, one associated with the original Wagner Act cases or the legislative debates preceding the adoption of the NLR Act had his attention called to a racial or kindred term of employment where it was *inevitable* that the interests of the representative and of the majority would be adverse to a statutorily-, not to say, constitutionally-, protected claim of a minority or dissident group or individual. See *Donnelly v. United Fruit Co.,* N. J. 1963, 190 A. 2d 835; Hain, *Black Workers Versus White Unions etc.,* 16 Wayne L. Rev. 37 (1969).

Verbally, and from one set of premises one may say "logically" as well, the reasoning which precludes a minority from bargaining about wages or normal working conditions also precludes the minority from bargaining about racial discrimination. But that argument proceeds from an implied premise that

Congress when it used the all-inclusive language of exclusivity set forth in Sections 8 and 9 of the NLR Act really meant to be all-inclusive. The plain fact of the matter is that there is not a shred of evidence to show that the draftsmen of the Act, its sponsors, the legislators who enacted it, the President who signed it, the lawyers who argued for it, or the Justices who sustained it ever contemplated the issue presented in the case at bar: whether the NLR Act gives to a white majority the power to foreclose a non-white minority from presenting to their employer those special issues which arise with respect to the employment of non-whites. It cannot fairly be supposed that by implication, or by the use of general language of an admittedly comprehensive nature, Congress intended to deny the non-whites what thoughtful persons must concede is elementary justice.

To leave non-whites at the mercy of whites in the presentation of non-white claims which are admittedly adverse to the whites would be a mockery of democracy. Suppression, intentional or otherwise, of the presentation of non-white claims cannot be tolerated in our society even if, which is probably at least the short-term consequence, the result is that industrial peace is temporarily adversely affected. In presenting non-white issues non-whites cannot, against their will, be relegated to white spokesmen, mimicking black men. The day of the minstrel show is over.

Inasmuch as the NLR Act lends itself to a construction which avoids the denial of elementary

justice it is unnecessary for this court to consider whether if the statute did deny the non-white minority the right to present issues which have a non-white hue, the NLR Act as applied to the minority would be repugnant to the Fifth, Thirteenth, or Fifteenth Amendments to the United States Constitution.

Some miscellaneous points should be answered before concluding.

There is, of course, no question that the issues tendered by Hawkins and Hollins related to "working conditions" as that term is used in Sections 7, 8, 9, and other parts of the NLR Act.

Therefore, unless the "exclusivity" doctrine stood in the way, Hawkins and Hollins had a statutorily-protected right to picket in order to present their claim with respect to alleged discrimination against non-whites. This was indeed specifically recognized by the Court of Appeals for the Ninth Circuit in the first stage of *NLRB v. Tanner Motor LTD.*, 9th Cir., 1965, 349 F.2d 1, although, of course, in the second stage of the same case, *NLRB v. Tanner Motor LTD,* 9th Cir., 1969, 419 F.2d 216, the Ninth Circuit has reached a conclusion diametrically opposed to the one set forth in this opinion.

In this case there is not properly before us as a Court of Appeals any question as to whether the language, signs, and like utterances by Hawkins, Hollins, and their associates were such as to deprive them of a statutory privilege against discriminatory action by their employer. The NLRB itself, (though not its trial

examiner) refrained from any comment on those utterances, The Board, in short, did not refuse to issue a complaint against Emporium on any ground related to the utterances of Hawkins and Hollins. We are, therefore, not called upon to decide whether we think such utterances fall within the doctrines of *NLRB v. Local Union No. 1229,* 1953, 346 U.S. 464, 472 and *Patterson Sargent Co.,* 1956, 115 NLRB 1627, 38 LRRM 1134.

Certainly the Board was warranted in not placing petitioner beyond the pale of legal relief merely because the vulgar language and the want of "company loyalty" of Hawkins and Hollins, and their disregard of the truth were offensive. See *Dobbs Houses v. NLRB,* 4th Cir., 1963, 325 F.2d 531, and *Crown Central Petroleum Corp. v. NLRB,* 5th Cir., 1970, 430 F.2d 724, 731.

For judges to make a ruling upon the effect of language and conduct which in its opinion the NLRB did not characterize and rule be either permissible or impermissible would be to arrogate unto ourselves a preliminary fact-finding and law-determining function which Congress has entrusted to the Board and not to our non-expert hands. Nothing said herein, however, is to be construed as indicating approval of the vulgarities and exaggeration in the utterance of Hawkins, Hollins and their fellows are. To be sure, those who use such Billingsgate are not on that account to be denied legal relief. Nonetheless, it is fitting for the court to remind those represented by petitioner that their interests, as well as the interests

of the employer and, more important, of democratic society favor rational discussion, and not abusive intemperate name-calling. Those who seek an understanding tolerance would do well to practice it.

In my view, the NLRB's order should be set aside, and the Board be directed to take further proceedings in conformity with this opinion. I see nothing to be gained by a broad as distinguished from a narrow, directory remand unequivocally commanding the NLRB to grant the relief sought by the complaint. I see no possible way of avoiding the head-on challenge to the exclusivity principle which is involved in the uncontrovertible facts. Justice delayed is justice denied.

United States of America
Before the National Labor Relations Board

Case 20—CA—5304

The Emporium and Western Addition Community Organization

[Filed July 23, 1971]

DECISION AND ORDER

On October 20, 1969, Trial Examiner William E. Spencer issued his Decision in the above-entitled proceeding, finding that Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the General Counsel and the Charging Party filed exceptions to the Trial Examiner's Decision together with supporting briefs, and Respondent filed cross-exceptions to the Trial Examiner's Decision and in opposition to the General Counsel's exceptions together with a supporting brief.[1]

[1] *Amici curiae* briefs were filed by the Department Store Employees Union Local 1100, Retail Clerks International Association, AFL-CIO, the National Association for the Advancement of Colored People, and the Equal Employment Opportunity Commission. Respondent also filed a brief in reply to the *amici* briefs.

On December 14, 1970, the National Labor Relations Board having determined that the instant case raised issues of substantial importance in the administration of the National Labor Relations Act, as amended, notified the parties that oral argument on the case would be heard by the Board on January 4, 1971. All parties participated in the oral argument which was subsequently held on the aforesaid date.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, the oral argument, and the entire record in the case, and hereby adopts the findings, conclusions,[2] and recommendations of the Trial Examiner.

[2] Unlike our dissenting colleague, Member Jenkins, we conclude that the record before us neither requires nor allows findings as to two matters which were not alleged or litigated but which, nevertheless, are assumed as facts and supply the foundation of his dissent, specifically: (1) that Respondent was engaged in a pattern or practice of racial discrimination, and (2) that the Union's efforts to remedy that supposed discrimination were so limited that the Union breached its duty of fair representation, and should forfeit its status as the exclusive representative of employees in the bargaining unit. Furthermore, since those issues were not litigated, any factual findings with respect to them could not properly be made upon this record. Thus the sole issue presented for decision on this record is whether the conduct of the discharged employees was unprotected because in derogation of the duly designated exclusive bargaining representative. For the reasons stated by the Trial Examiner, we agree that the actions of the discharged employees in abandoning the contractual grievance procedure and seeking to initiate direct negotiations with Respondent by picketing and boycott activities were not protected by the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

Dated, Washington, D.C., July 22, 1971.

Edward B. Miller, Chairman
(Seal) John H. Fanning, Member
Ralph E. Kennedy, Member
National Labor Relations Board

Member JENKINS, dissenting:

Respondent, The Emporium, operates a department store in the San Francisco area. It has a collective-bargaining agreement with the Union, containing a clause prohibiting racial discrimination. Respondent discharged two Black employees for orderly picketing and leafletting of Respondent's store in protest of alleged racial discrimination respecting promotions and other terms and conditions of employment.

Over 6 months before the picketing and leafletting began, the Union had alleged The Emporium had violated the nondiscrimination clause, and had sought to pursue individual cases of alleged discrimination through the grievance and arbitration procedure established by the collective-bargaining agreement. Some employees, including those discharged, considered that the alleged discrimination problem affected all black,

brown, yellow, and red employees. They objected to the Union's limiting grievances to individual cases as being too slow, narrow, and ineffective as a remedy, and asked the Union to seek grievance adjustment, and arbitration if necessary, of the broad question of all phases of discriminatory treatment of all Black and other minority employees. The Union declined, and the picketing and leafletting resulted.

The question thus presented is whether concerted activity by employees protesting the existence of all forms of alleged racial discrimination loses its protection under the Act because the Union representing the employees has taken a position in support of eliminating some, but not all, phases of the alleged discrimination.[3]

The Trial Examiner found that the picketing and leafletting lost its protection, primarily for two reasons: (1) The Union is the exclusive representative of the employees under the Act; the Act entitles the Employer to deal only with the Union rather than bargain on two fronts; thus the picketing and leaf-

[3]It will be noted, contrary to the statement in fn. 2 of the majority opinion, that I have set forth the facts as involving "alleged" discrimination, and have refrained from any indication of the merit (or lack of it) in the protesting employees' assertions that Respondent engaged in racial discrimination. If the employees were of the opinion that such discrimination existed, and protested, this suffices (in the absence of additional factors such as those subsequently considered in the text) to make their activities concerted and concerned with terms and conditions of their employment, and thus brings such activities within the protection of Section 7. It is on this principle, and on these facts, that my subsequent analysis and discussion is based—as I had thought was clear. While it would make no difference in my conclusions whether the Union agreed or disagreed with the protesters, I note further that the Union also was of the opinion that Respondent practiced racial discrimination.

letting undermined the Union's exclusive representation of the employees; and (2) the Union had made substantial and good-faith efforts to achieve an orderly solution to the problem within the collective-bargaining processes.[4]

Neither of these reasons withstands scrutiny.

The union's right to be the exclusive representative of the employees originates in the principle of collective bargaining established by the Act. This principle requires that the representative of the employees present a single set of demands or goals covering all employees, and that whatever bargain is struck with the representative by the employer be applicable to all employees, so that the employer need bargain neither with splinter groups of employees nor with individual employees, and may not undermine the union by doing so. This in turn implies that the union must have the

[4]The third ground relied on by the Trial Examiner, that the discharged employees were only "self-styled" representatives of others, does not warrant further consideration here, for it is plain the activity was concerted and related to conditions of employment. I do not suppose my colleagues to rely on this ground. The Trial Examiner's inference that the protesting employees, by seeking a meeting with the Employer's president, were thereby seeking to "bargain" for all minority employees apart from the Union appears unfounded. Their desire to talk to Respondent's president, far from evincing a desire to "bargain," merely reflected a traditional opinion shared by Blacks and often enforced by actual experience that only the president or "boss" of the company can effect permanent solutions to problems involving racial discrimination. Apart from this consideration, there is no rule of law which requires an employee to adjust his grievance with a lower ranking official or which transforms a grievance when presented to the president of a company into collective bargaining. Nor is there any reason why a grievance may not pertain to a group rather than an individual complaint and accordingly be resolved on a group rather than an individual basis.

power to balance and adjust the legitimate competing claims within the employee groups, and that whatever adjustment is arrived at fairly by the union and its membership forecloses individual or splinter-group assertion of conflicting positions. It was these considerations of balances, adjustment, and exclusive representation which the Trial Examiner applied to find that the leafletting and picketing here were unprotected.

This application rests upon a serious misconception. Union action preempts or forecloses individual employee action only in those cases where the balancing of competing *legitimate* interests of employees is involved. In the case of racial discrimination, no such balancing is permitted. A union cannot permit a little, or a lot, of racial discrimination against one group in order to obtain something in a different area from the employer, for a different group of employees. Such "balancing" has been unlawful since *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192.

In *Steele* the Supreme Court held that a collective-bargaining agreement entered into between the employer and the union was unlawful to the extent it discriminated against Black employees on racial grounds. The Court reasoned as follows:

> If as the state court has held, the Act confers this power [of exclusive representation free from any challenge by those represented] on the bargaining representative of a craft or class of employees without any commensurate statutory duty toward its members, constitutional questions arise. For the representative is clothed with

power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and *which is also under an affirmative constitutional duty equally to protect those rights.* If the Railway Labor Act purports to impose on petitioner and the other Negro members of the craft the legal duty to comply with the terms of a contract whereby the representative has discriminatorily restricted their employment for the benefit and advantage of the Brotherhood's own members, we must decide the constitutional questions which petitioner raises in his pleading.

But we think that Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of a craft, to represent the craft, did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority. [323 U.S. at 198-199, emphasis supplied.]

* * * * *

We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, cf. *J. I. Case Co. v. N.L.R.B., supra,*

335, but it has also imposed on the representative a corresponding duty. We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.

This does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the craft represented. Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority, the type of work performed, the competence and skill with which it is performed, are within the scope of the bargaining representation of a craft, all of whose members are not identical in their interest or merit. [Citations omitted.] Without attempting to mark the allowable limits of differences in the terms of contracts based on differences of conditions to which they apply, it is enough for present purposes to say that *the statutory power to represent a craft and to make contracts as to wages, hours and working conditions does not include the authority to make among members of the craft discriminations not based on such relevant differences. Here the discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations.* [Citations omitted.]

> The *representative which thus discriminates may be enjoined from so doing,* and its members may be enjoined from taking the benefit of such discriminatory action. *No more is the Railroad bound by or entitled to take the benefit of a contract* which the bargaining representative is prohibited by the statute from making. In *both cases the right asserted, which is derived from the duty imposed by the statute on the bargaining representative, is a federal right* implied from the statute and the policy which it has adopted. It is the federal statute which condemns as unlawful the Brotherhood's conduct. [323 U.S. at 202-204, emphasis supplied.]

These principles, though first enunciated in Railway Labor Act cases, are equally applicable under the National Labor Relations Act. *Ford Motor Company v. Huffman,* 345 U.S. 330. In so holding, the Supreme Court stated:

> The National Labor Relations Act, as passed in 1935 and as amended in 1947, exemplifies the faith of Congress in free collective bargaining between employers and their employees when conducted by freely and fairly chosen representatives of appropriate units of employees. That the authority of bargaining representatives, however, is not absolute is recognized in *Steele v. Louisville & N. R. Co.,* 323 U.S. 192, 198-199, in connection with comparable provisions of the Railway Labor Act. Their statutory obligation to represent all members of an oppropriate unit requires them to make an honest effort to serve the interests of all of those members, without hostility to any. *Id.,* at 198, 202-204; *Tunstall v. Brotherhood of Locomotive Firemen,* 323 U.S. 210, 211; *Brotherhood of Railroad Trainmen v. Howard,* 343, U.S. 768. [345 U.S. at 337.]

The principles of *Steele* have been uniformly followed, refined, and broadly applied in a long line of cases since then, including *Tunstall v. Brotherhood of Locomotive Firemen,* 323 U.S. 210; *The Wallace Corporation v. N.L.R.B.,* 323 U.S. 248, 255-256; *Graham v. Brotherhood of Locomotive Firemen & Enginemen,* 338 U.S. 232; *Brotherhood of Railroad Trainmen v. Howard,* 343 U.S. 768; through *Humphrey v. Moore,* 375 U.S. 335, to its latest expression in *Vaca v. Sipes,* 386 U.S. 171. These cases all make it clear that a union's obligation under this Act is to refrain from actions which permit discrimination on arbitrary or invidious grounds. This duty to refrain, as explicitly stated in *Steele,* includes the duty not to engage in, permit, or tolerate provisions in bargaining agreements, or practices under or outside such agreements, which constitute or permit such invidious discrimination. It follows from this that whenever union conduct falls short of this obligation, it cannot preempt or foreclose the concerted action of employees, outside the collective-bargaining relationship, directed toward doing the very thing which the union itself is obligated to do. If this were not so, we would face the grave constitutional questions concerning the validity of the union's representation which the Court noted in *Steele.*

As this Board pointed out in *Tanner Motor Livery, Ltd.,* 166 NLRB 551, the union is required, by its

duty of fair representation and by constitutional considerations, to support the elimination of racial discrimination; consequently, the protest of racial discrimination in employement *cannot* be in opposition to or at cross-purposes with the union's position. As the Board there held:

> [T]he Board cannot presume or conclude that, contrary to the course being urged by Abramson and Dorbin, the Union knowingly would have taken the unlawful position that it would refuse to represent Negro drivers fairly if hired. Rather, we must assume that these employees were acting in accord with, and in furtherance of, the lawful position of their collective-bargaining agent. For the Board to find, therefore, that the employees' otherwise protected concerted activities herein were rendered unprotected by virtue of an existing collective-bargaining agreement between the Union and the Respondent would be offensive to public policy. [166 NLRB at 551-552; footnotes omitted.][5]

[5]The Ninth Circuit, in remanding *Tanner*, did so on the ground that the protesting employees had not first sought to pursue their cause through the union, 419 F.2d 216. In the present case the employees did request or demand that the Union pursue the broad overall grievance and it was only after the Union declined to do so that they began the picketing and leafletting. The court left standing the Board's finding that employees who engaged in concerted protests of an employer's racially discriminatory practices were entitled to the protection of Section 7 of the Act.

In the recent case of *Washington State Service Employees State Council No. 18*, 188 NLRB No. 141, this Board held that the protection accorded to such protests in *Tanner Motor* extended even to protests which occurred outside the immediate employer-employee relationship. As this recent decision clearly demonstrates, the right to engage in such activities stands on a different footing from the collective-bargaining relationship.

To hold otherwise would permit a union to control the scope, direction, pace, and degree of elimination of racial discrimination, of which any voluntary tolerance by the union breaches its duty of fair representation. The only permissible collective bargaining concerning racial discrimination is its elimination.

No court has permitted the existence of a collective-bargaining agreement to stay its hand in ordering an employer to eliminate discrimination. Further, employers can unilaterally change existing collective-bargaining agreement provisions which have discriminatory effects and may do so free from the threat of a strike. See *U.S. v. Local 189, Papermakers,* 282 F. Supp. 39, 42-44 (E.D.La., 1968). As to discriminatory practices which are not derived from or are not inherent in the collective-bargaining agreement, employers are not only free unilaterally to eliminate such discrimination, but are dutybound to do so. They cannot be heard to protest that their failure to eliminate discriminatory practices or to treat with employees who concertedly protest such practices is in derogation of the exclusive representative status of the union. Nor may they shift their responsibility under the national labor policy to eliminate all racial discrimination to the union by making such illegal discrimination a matter solely within the jurisdiction of a grievance-arbitration procedure, thereby placing the burden largely on the union and providing themselves with a ready defense to any and all concerted activities by their employees to directly eliminate discriminatory practices. If a union position in favor of the elimi-

nation of *some* but not all racial discrimination can foreclose concerted employee activity to remove *all* racial discrimination, collective bargaining on this subject is converted from a shield protecting employees against racial discrimination into a sword by which such protection can be cut down or cut back. As the Court held in *Graham v. Brotherhood of Locomotive Firemen & Enginemen,* 338 U.S. 232, 239, the Railway Labor Act

> imposes upon the [union] the duty to represent all members of the [unit] without discrimination and *invests a racial minority of the [unit] with the right to enforce that duty.* [Emphasis supplied.]

Steele, supra, held that the members of the union "may be enjoined from taking the benefit of [the] discriminatory action" and the employer is not "entitled to take the benefit" of the discriminatory practices, and *Graham, supra,* held that the act "invests a racial minority of the [unit] with the right to enforce that duty" of fair representation. Thus the victims of discrimination have a right under the Act to sue both the employer and their union in order to end the discrimination. If union inactivity to end discrimination cannot cause such extreme measures by the employees to lose them the protection of the Act, plainly that protection cannot be lost by the employees' efforts at persuasion here.

Accordingly, the principle of exclusive representation by the union cannot preclude the picketing and

leafletting the employees engaged in here, nor deprive such activity of protection under the Act.

It is the Board's apparent inability to retain a grasp on these principles which led the Supreme Court, in *Vaca v. Sipes,* 386 U.S. 171, to hold that the Board does not have preemptive jurisdiction over breaches of the duty of fair representation and that the courts retain concurrent jurisdiction over such violations of this statute. In explaining its reason for such conclusion, the Court stated that should this Board be found to have preemptive jurisdiction

> the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of his complaint, since the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint [citations omitted]. The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine. For these reasons, *we cannot assume from the NLRB's tardy assumption of jurisdiction* in these cases that Congress, when it enacted N.L.R.A. § 8(b) in 1947, intended to oust the courts of their traditional jurisdiction to curb arbitrary conduct by the individual employees' statutory representative. [386 U.S. at 182-183; emphasis supplied.]

In addition to having made a "tardy assumption" of its responsibilities in this area in the past, the Board here, by holding the concerted conduct of the employees to be unprotected and thus sanctioning their

discharge, places itself in the position of participating in and aiding and abetting the continuance of those phases of racial discrimination which the Union elected not to try to remedy. In *Independent Metal Workers Union, Local No. 1 (Hughes Tool Company),* 147 NLRB 1573, the Board stated that it "cannot validly render aid under Section 9 of the Act" to a labor organization which discriminates racially. Yet here, the Board as an organ of the Government, by withdrawing its protection from these employees who are protesting racial discrimination, is breaching its constitutional and statutory obligation not to aid or permit such discrimination. *Brown v. Board of Education,* 347 U.S. 483; *Shelley v. Kraemer,* 334 U.S. 1.

The Trial Examiner also relied upon the Union's good-faith efforts to achieve an orderly solution to the problem within the collective-bargaining relationship as a ground for finding that the concerted activity outside union channels was unprotected.

This position misconceives the problem. The question is not whether the Union moved as vigorously or as effectively as it reasonably could have. It may have done so. The Employer's economic power and the desire to retain economic benefits of racial discrimination may impose severe limitations on a union's ability to make progress on this front. Indeed, there is no intimation in this case that the Union had the ability to do substantially more than it had undertaken to do, and the Employer's prompt retaliation by discharging the picketing and leafletting employees suggests that perhaps the Union may have been exert-

ing the full range of its power and ability to eliminate racial discrimination.[6]

The union's own judgment of its capabilities with regard to the pace and scope of eliminating the discrimination may result from its own fair estimate of the realities[7] and in that sense may not be grounded in bias or hostility. But the absence of subjective bias or animus is irrelevant to the duty of fair representation, and it does not follow from the absence of hostility by the union that the employees cannot them-

[6]The reverse, of course, may also be true, with the union rather than the employer exercising the greater power and resisting the elimination of discrimination. The existence of racial discrimination does not automatically imply that both the union and employer have committed violations of the Act, though this may be true in some cases. The issue can be resolved by charging both with violations, ascertaining through the hearing process which was the responsible party, and holding it liable for the remedy. The preceding portion of this footnote and the paragraph in the text to which this note is appended make it plain, contrary to the statement of the majority in fn. 2, that I make no assumption that the Union here has breached its duty of fair representation; rather, the reverse is true. The further statement in fn. 2 that I also assume or infer that because of this breach the Union should forfeit its status as bargaining representative is gratuitous. I have suggested no such proposal, either explicitly or implicitly.

[7]It hardly follows from this, of course, that the Trial Examiner was correct in his conclusion that the Union was *in fact* "endeavoring in every way available to it under the agreement to adjust any and all cases of racial discrimination brought to its attention." The record shows an unexplained time lag between May and September when the Union apparently did nothing. At the May meeting, the disenchanted employees asked for a delay only until the return of employee Young who was about to go on vacation. In addition, there is no evidence that the Union actually investigated the merits of the numerous complaints Johnson received from approximately 40 employees who attended the April 3 meeting. Indeed, there is evidence in the record that throughout the summer various employees expressed to Johnson frustration at the delay and implored him to take action. It is apparent that the delay engendered suspicion of the motives of the Union and that the frustrations built up during the summer months contributed to the discriminatees' resort to the activities for which they were discharged.

selves then take action under the protection of the Act in support of the complete elimination of racial discrimination. The right to be free from racial discrimination in employment does not arise solely from this statute creating union representation but, as *Steele* held, is in substantial part based upon the Constitution which requires the exclusive representative under this Act to refrain from tolerating racial discrimination respecting terms and conditions of employment. In this respect, it is analogous to the employer's freedom of speech to oppose unions, or the union's freedom of speech in handbilling: There are some respects in which it cannot be circumscribed or limited by the Act or by this Board. One of these is the freedom from limiting the protection of the Act by union preemption through the union's assertion of a lesser opposition to racial discrimination than the protesting employees assert. If the employees cannot engage in concerted activity to eliminate racial discrimination entirely after the union has declined to try to do so, a union interested in retaining discrimination can preempt the field by moving only at a snail's pace, or in token areas.

Finally, the doctrine enunciated by the Court in *Steele* has been embraced by the Congress in the enactment of Title VII of the Civil Rights Act of 1964, so that the national labor policy itself specifically forbids racial discrimination in the terms and conditions of employment, and its existence is unlawful.[8]

[8]Section 704(a), 42 U.S.C. § 2000(e)—3(a). This act establishes additional governmental agencies and procedures for carrying out this policy, but of course does not relieve this Board of its continuing responsibilities.

The Act we administer must be read consistently with other Federal statutes which establish the national labor policy. *Textile Workers Union of America, AFL-CIO v. Lincoln Mills*, 353 U.S. 448, 456-458. To withdraw the protection of this Act from these employees whose concerted protest was in furtherance of the national labor policy, merely because their Union stopped short of assuming its full obligations under the statute, is contrary to the express purposes of Congress and to the national policy itself.

Consequently, the employees' handbilling and leafletting remained concerted activity and protected under Section 7 of the Act, and the discharge of the employees for such activity violated Section 8(a)(1). Accordingly, I think we are required to reverse the Trial Examiner and find the discharges to be unlawful.

Dated, Washington, D.C.,
July 22, 1971.

Howard Jenkins, Jr., Member
National Labor Relations Board

Member BROWN, dissenting:

I agree with Member Jenkins, though not with his rationale in its entirety, that Respondent violated Section 8(a)(1) of the Act by discharging two employees, Hawkins and Hollins, who engaged in orderly picketing to protest alleged discrimination against minority group employees with respect to terms and conditions of employment.

The Respondent, a member of a multiemployer group, is signatory to a collective-bargaining agreement with Department Store Employees Union. Section 21(E) thereof provides:

> No person shall be discriminated against in regard to hire, tenure of employment or for status by reason of race, color, creed, national origin, age or sex . . . .

and section 5(B) reads:

> Any act of any employer, representative of the Union or any employee that is interfering with the faithful performance of this agreement—may be referred to the Adjustment Board for such action as the Adjustment Board deems proper, and is permissive within this agreement.

The agreement also provides for no-strikes or lockouts and other sections detail the composition and functions of the Adjustment Board and provide for arbitration where an impasse is reached between union and management representatives appearing before the Board.

In April 1968, it became an "official" position of the Union that Respondent was discriminating against employees of minority races, especially against Negroes and older employees. It so informed the Respondent. Nothing came of the complaint. In time, and after further discussion with minority group employees and governmental and other interested agencies, it was agreed that the Union would take whatever steps necessary, including arbitration, to adjudicate the employees' grievances. Accordingly, on September 4, the Union formally charged the Respondent with breach of Sections 21(E) and 5(B) and asked for an Adjustment Board meeting, although it was prepared to proceed to arbitration if the Respondent were willing.

The Union's attempt to adjudicate the grievances on an individual basis met with objections from Hawkins and Hollins and other employees. They desired the matter to be presented as an issue affecting all employees, and insisted on meeting with Respondent's president. It is not clear whether the employees in attendance were only those whose grievance the Union was prepared to prosecute then. In any event, the meeting apparently terminated when Hawkins, Hollins, and the other employees walked out.[9] However, as the result of the Union's representations one employee, who had complained about discrimination in the past, was promoted and one other employee was said to have benefited from the Union's intervention.

The efforts of Hollins to meet with Respondent's president to present his views and to discuss what was happening among minority employees were unsuccessful. On November 2, Hawkins, Hollins, and at least two other employees began picketing the Emporium. The picketing was on the employees' own time, it was orderly, and was accompanied by the distribution of pamphlets which called on the public

[9]Another meeting of the Adjustment Board was held without the presence of employees who walked out but what, if anything, resulted therefrom is not indicated.

to boycott Respondent because of its alleged racial policies. The Respondent followed with a warning to the employees that their charges were untrue, their activities injurious to the Respondent, and that they could be discharged if these activities continued. When a week later the employees again picketed the store, Respondent discharged Hawkins and Hollins. The reason assigned was the distribution of the boycott pamphlets on November 9. The Union thereafter protested the discharges to the Respondent, although it was not the one to file the charge in the instant proceeding. It was neither charged nor found that the Respondent had in fact discriminated against it (*sic*) minority employees.

The General Counsel maintained that the employees had reasonable grounds for believing that discrimination existed, and the Trial Examiner found that because of the "official" position adopted by the Union, of which the two employees had knowledge, Hawkins and Hollins acted in a good-faith belief that Respondent was practicing discrimination.[10]

The Trial Examiner acknowledged that "concerted employee activities with an object of bettering the working conditions of employees belonging to minority groups . . . are protected under the Act is hardly open to challenge," and that, unlike the situation in *Tanner*[11] there is no evidence that the picketing had as an object the hiring of minority group

[10]I agree with the Trial Examiner that there is no basis for drawing an inference that the Respondent discriminated against the employees on racial grounds. Nor would I find that the Union on its part breached its duty of fair representation.

[11]*Tanner Motor Livery, Ltd.*, 148 NLRB 1402.

employees. In dismissing the 8(a)(1) allegation of the complaint, however, he concluded that the employees had, nonetheless, lost the protection of the Act because their activities amounted to, in short, no less than a demand that the Respondent bargain with the picketing employees for the entire group of minority employees on terms and conditions of employment.

I find, however, that the Trial Examiner misconceived the nature of the employees' concerted activities. There is nothing in the evidence, on which the Trial Examiner relied, indicative of a purpose to "negotiate" with Respondent's president on any terms or conditions of employment. All that is shown is that Hollins told Batchelder he wanted to "discuss what was happening among minority employees," that the employees picketing would be satisfied with nothing less than a meeting with him, that they wanted to "talk to the top management to get better conditions for the Emporium," and that they were seeking to accomplish their objectives through "group talk and through the president if we could talk to him." Granted that the employees were seeking "better conditions" and a meeting with Respondent's president for that purpose, it is nonetheless apparent that what the Trial Examiner conceived as a demand for bargaining for the minority employees was no more than an effort on the part of those seeking the meeting to urge upon the president to use his good offices to see to it that the alleged discriminatory treatment of the minority employees, which both the employees and the Union believed in fact existed, and were

in violation of an express provision of the contract, was corrected. Such a course was unquestionably open to the Respondent to take without in any way infringing on the Union's status as the recognized bargaining representative.[12] Indeed, it was an obligation imposed upon Respondent not only by the contract's nondiscrimination provision, but by the mandate of Title VII of the Civil Rights Act of 1964.[13] Moreover, it is equally clear from the enactment of Section 9(a) that it was not congressional intent that the mere submission of a grievance by an employee was to be considered in derogation of the rights of employees to bargain through their chosen representative.

There is not a scintilla of proof that the picketing employees wanted discussions leading to agreements on new conditions of employment, or even a modification of existing ones, or even to effect a compromise of the grievances. In short, the employees did not picket Respondent for the purpose of negotiating an

[12]Section 9(a) of the Act.

[13]The Supreme Court cited in *Southern Steamship Company v. N.L.R.B.*, 316 U.S. 31, 47, that the Board may not ignore other and equally important congressional objectives. In enacting the Civil Rights Act of 1964 Congress expressed its deep concern that the invidious practice of discrimination in employment based on racial grounds be eliminated. And such has similarly been the concern of the judiciary. (See *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192.) It is not, of course, the Board's function to enforce provisions of the Civil Rights Act but I think it is incumbent on the Board, when presented with an issue involving racial discrimination in employment, that it should not lightly condone disciplinary action against employees engaged in concertedly protesting alleged discrimination because of race unless the concerted conduct involves a most serious breach of the policies underlying our own Act. Such is not the case here.

agreement but simply to urge Respondent to take action to correct conditions of racial discrimination which the employees reasonably believed existed at the Emporium. In fact, insofar as this record shows, the picketing employees sought only a simple conference to call attention to their situation; it is not even clear that they intended to present a formal grievance. I cannot see how on the tenuous evidence present in this case, the majority can find that "to extend the protection of the Act to the two discharged employees would seriously undermine the rights of employees to bargain collectively through representatives of their own choosing."

I find no ground justifying the discharges of the two employees for engaging in concerted activity within the meaning of Section 7 of the Act.[14] I would reverse the Trial Examiner, find the 8(a)(1) violation, and grant the appropriate remedy.

Dated, Washington, D.C.
July 22, 1971.

Gerald A. Brown, Member
National Labor Relations Board

[14]The Trial Examiner did not find, nor would I, that the language used by the employees in their appeal to the public was so intemperate as to deny them the protection of the Act. (See *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 63 (1966). *Pettway v. American Cast Iron Pipe Company*, 411 F.2d 998, 1007 (C.A. 5, 1969). Nor do I find merit in Respondent's contention that the employees' conduct was sufficiently disloyal to make such conduct unprotected activity. The picketing was conducted on the employees' own time and there was no withholding of services and no request that other employees do so. The pamphlets did not attack the quality of Respondent's goods or services but only the discriminatory conditions of employment it was believed prevailed. See *Edir, Inc., d/b/a Wolfie's*, 159 NLRB 686.

United States of America
Before The National Labor Relations Board
Division of Trial Examiners

Branch Office
San Francisco, California

Case No. 20-CA-5304

The Emporium and Western Addition Community Organization	}

Walter L. Kintz, Esq., and Douglas H. Barton, Esq., for the General Counsel.

George O. Bahrs, Esq., of San Francisco, Calif., for the Respondent.

Kenneth Hecht, Esq., of San Francisco, Calif., for the Charging Party.

TRIAL EXAMINER'S DECISION

William E. Spencer, Trial Examiner: The complaint in this proceeding,[a] based on a charge duly filed on November 19, 1968, alleged in substance that the Respondent herein, in violation of Section 8(a)

[a]Dated March 4, 1969.

(1) of the National Labor Relations Act, hereinafter called the Act, discharged two of its employees, Jim Joseph Hollins and Tom Hawkins, because of their protected concerted activities. Respondent in its duly filed answer denied the said allegation.

A hearing participated in by all parties was conducted before me in San Francisco, California, on April 8, 1969, and on or before May 15, 1969, each of the parties filed a brief.

Upon the entire record, my observation of witnesses, and upon consideration of the excellent and helpful briefs filed with me, I make the following:

Findings of Fact

I. The Business of the Employer

Respondent, a California corporation, engaged in the operation of retail stores in the State of California, during the past year in the course and conduct of its business operations, made gross sales in excess of $500,000, and purchased and received goods valued in excess of $50,000 directly from outside the State. This proceeding is directly related to the operation of its San Francisco department store, The Emporium.

II. The Labor Organization Involved

Department Store Employees Union, called the Union hereinafter, is a labor organization which at all times material herein was the exclusive representative of Respondent's employees in an appropriate unit, at its San Francisco store, The Emporium.

III. The Alleged Unfair Labor Practices

1. *The issue*

This is a discharge case brought under Section 8(a)(1) of the Act. On November 11, 1968, The Emporium, a leading San Francisco department store, after a written warning, discharged two of its employees, Tom Hawkins and James Joseph Hollins, both Negroes, when for a second time they picketed the store on their own time, both times calling for a boycott of the store by a minority race on the ground that the store was "racist."

2. *Respondent's bargaining agreement*

At all material times the Respondent was a member of a multi-employer group and as such signatory to a collective bargaining agreement with the Union. No question is raised as to the validity of the agreement or the status of the Union as exclusive bargaining representative of Respondent employees in an appropriate unit.

This agreement provides, *inter alia.:*

Section 36(A), "There shall be no strike or lockout during the life of this agreement."

Section 21(E), "No person shall be discriminated against in regard to hire, tenure of employment or job status by reason of race, color, creed, national origin, age or sex."

Section 5(B), "Any act of any employer, representative of the Union, or any employee that is interfering with the faithful performance of this agreement . . . may be referred to the Adjustment Board for such action as the Adjustment Board deems proper, and is permissive within this agreement."

Section 36(B, C, D, E, F) contains a detailed description of the functions of the Adjustment Board, its composition, and provisions for arbitration where an impasse is reached between union and management representatives appearing before the Board.

3. *The issue of racial discrimination*

Walter L. Johnson, chief executive officer of the Union, testified credibly that after discussions with employees in April, 1968, it became the "official" position of the Union that discrimination against employees belonging to minority races existed in Respondent's San Francisco store. Following a meeting in April, the Union's position with respect to discrimination and numerous other matters affecting employment in Respondent's store, was formulated in a letter dated April 11, which included, *inter alia,* this language:

> Probably the most important matter raised was the possibility of racial discrimination. This is outlawed under the terms of the agreement and certainly again in this day and age should not be a problem. It was the general feeling of almost all present that discrimination does exist and that this discrimination is directed against the Negro employees and the more senior employees, senior, that is, in the point of age.

According to Johnson's credited testimony copies of this letter were distributed to several union members and it was also served on the Retailer's Council, the bargaining agent for the multi-employer unit with which The Emporium was affiliated. Following the issuance of this letter, according to Johnson, there were meetings with the Retailer's Council and The Emporium, at which it was agreed that the Respondent would "look into the matter" of discrimination and see what could be done to "improve conditions."

In May, at the request of a union member, Johnson met with some ten employees. At this meeting, according to Johnson's credited testimony, the main concern was the promotion of one Russell Young, a Negro. (This same matter had been broached in the prior meeting.) When it was pointed out that Young was leaving on his vacation it was agreed to take the matter up at a later meeting. This later meeting occurred about September 3 at the Union hall. In addition to Union representatives and some Emporium employees, it was attended by representatives of the Fair Employment Practices Committee (FEPC) and the Equal Economic Opportunity Commission (EEOC). The matter of Young was again stressed, it being claimed that he had been passed over for a promotion which was given, instead, to an "outsider."

Johnson testified concerning the September 3 meeting:

> At this meeting there were quite a few things discussed and we specifically informed the individuals that we were going to go into an Adjustment Board, that we wanted to process these grievances and we felt that there were problems of discrimination and it was my own personal feeling that all the discriminatory acts should be processed and that we ought to follow through and take care of it.
>
> At this meeting I specifically . . . pointed out that it is going to take a long time in some of these cases, but that they would not only be helping themselves, but other people involved in it, because we had very strong feelings on the question.
>
> It was agreed at that time and they were advised by both Mr. Scott (EEOC) and Mr. Smith (FEPC) to take it to the union and that the union should follow through and take whatever steps are necessary up to and including arbitration [provided for in the bargaining agreement] to adjudicate the grievances.

Both Hollins and Hawkins were present at this, and prior meetings.

By letter dated September 4, the Union addressed the Retailer's Council as follows:

> Department Store Employees Union has made every effort to resolve the grievances raised with The Emporium regarding matters concerning our members employed in the stock and marking areas.
>
> Apparently we have been somewhat less than successful in our efforts and it appears the only recourse we have is to request a meeting of the

Adjustment Board to hear the entire case. This communication will serve as our request for a meeting of the board.

We specifically charge the Emporium with violations of Section 5 B and 21 E, of the Agreement between the San Francisco Retailers Council and Local 1100. We have approximately 120 pages of testimony, recorded by a court reporter to substantiate our position.[1]

We are ready to proceed to immediate arbitration if the Emporium is agreeable.

Would you kindly contact me in order that a mutually convenient date may be agreed to.

Pursuant to this letter a meeting of the Adjustment Board, as provided for under the bargaining agreement, occurred on October 16. At this meeting the four employees who later picketed the Respondent, including Hawkins and Hollins, stated in effect that they would not participate as individuals but only as a group; that they objected to prosecuting grievances on an individual basis and wanted the matter of racial discrimination presented as an issue affecting all employees belonging to minority races; that they insisted on meeting with Respondent's president;[2] and would not go ahead with the Adjustment Board hearing. Thereupon, the four of them walked out of the meeting.

[1]A transcript was made of the meeting of September 3.

[2]Hawkins testified that Hollins said that they would not testify as individuals but only *as a group* whose main purpose was to talk to the Respondent's president and to *reach an agreement* with him on conditions at the Emporium; that they wanted to talk to the president or to no one.

Johnson, who was unable to attend the meeting but who called to inquire about it, testified concerning his reaction on being informed that the four employees refused to testify as individuals:

> I wasn't very happy because we had involved everybody including our attorney and we had prepared to go on into arbitration.
>
> Several times I informed all of the people that in my opinion the only solution to the problem was to follow the agreement in order that we could then have some lasting effect on any situation of discrimination.
>
> I feel very badly that we were not able to process it after the testimony was not presented by the affected individuals, and this is very vital testimony, our attorney advised that it would be very difficult to proceed to arbitration because we would not have a whole case to present.[3]

With respect to Russell Young concerning whom complaints had been filed with the Union on several occasions, apparently on the basis of the Union's representations he was promoted to the office of first assistant manager. The date of his promotion is not established but it occurred before the start of any picketing. Hawkins named one other, Fata, as having benefitted from the Union's intervention.

[3]Possibly there was a second meeting of the Adjustment Board on October 18, not attended by the four employees who walked out on the prior meeting, but what business, if any, was transacted there, is not sufficiently developed in the record for a finding.

4. *The picketing*

Unable to have the issue of racial discrimination as they viewed it processed by the Union as a single issue affecting all employees belonging to minority races, Hollins attempted to present his views in the matter to Respondent's president, Batchelder. He told Batchelder that he wanted to discuss what was happening among minority employees. Batchelder replied that Personnel Director, Henderson, attended to such matters and he should see Henderson who took care of "problems like that." Hollins testified that he had previously discussed the issue with Henderson but now refused Batchelder's suggestion.[4]

On October 22, Hawkins, Hollins, and two or three other employees, held a press conference regarding what they viewed as Respondent's discriminatory racial policies. Attending this meeting were representatives of local newspapers and radio stations. It being admitted that the statements these employees made public at this meeting were substantially the same as the text of pamphlets they later distributed while picketing, reference is made to that text to be reproduced below.

On the following Saturday, November 2, Hawkins, Hollins, and at least two other employees not named in the complaint began picketing in front of The Emporium. The picketing occurred on their own time.

[4]Later, while the picketing was in progress, Johnson saw Hollins and when Hollins told him the only one they [the picketeers] wanted to talk to was Batchelder, replied that he, Johnson, was spokesman for the Union, represented a few thousand clerks, and had never met Batchelder.

The entrances to the store were not obstructed. There was neither violence nor incitation to violence. The text of the pamphlets distributed to passersby by those picketing follows:

BEWARE EMPORIUM SHOPPERS
BOYCOTT IS ON ! ! !

For years at The Emporium black, brown, yellow and red people, have worked at the lowest jobs, at the lowest levels. Time and time again we have seen intelligent hard working brothers and sisters denied promotions and basic respect.

The Emporium is a 20th Century colonial plantation. The brothers and sisters are being treated the same way as our brothers are being treated in the slave mines of South Africa.

Whenever the racist pig at The Emporium injures or harms a black sister or brother, they injure and insult all black people. The Emporium must pay for these insults. Therefore, we encourage all of our people to take their money out of this racist store, until black people have full employmeint and are promoted justly throughout The Emporium.

We welcome the support of our brothers and sisters from the churches, unions, sororities, fraternities, social clubs, Afro-American Institute, Black Panther Party, W.A.C.O. and the Poor People's Institute.

5. *The discharge*

On November 7, Hawkins and Hollins were called to the office of Respondent's manager of labor relations, Paul Ehrenfried, and handed the following notice:

On October 22, 1968, you issued a public statement at a press conference to which all newspapers, radio, and TV stations were invited. The contents of this statement were substantially the same as those set forth in the sheet attached. This statement was broadcast on Channel 2 on October 22, 1968 and Station KDIA.

On November 2nd you distributed copies of the attached statement to Negro customers and prospective customers, and to other persons passing by in front of The Emporium.

These statements are untrue and are intended to and will, if continued injure the reputation of The Emporium.

There are ample legal remedies to correct any discrimination you may claim to exist. Therefore, we view your activities as a deliberate and unjustified attempt to injure your employer.

This is to inform you that you may be discharged if you repeat any of the above acts or make any similar public statement.

On November 9, Hollins and Hawkins for a second time, again on their own time, picketed The Emporium and handed out pamphlets to the public which in all material respects were identical with the pamphlets distributed on the prior occasion. As on the prior occasions there was no violence, no incitation to violence, no criticism of Respondent's product, and no blocking of entrances to Respondent's store.

On November 11, the Respondent discharged Hollins and Hawkins. The discharge slips given these employees bore the notation:

You are being discharged today. Distribution of "Boycott Emporium" literature on Saturday, November 9, 1968 in front of The Emporium, 855 Market Street, S.F., pursuant to written warning dated 11/7/68 for similar action on 11/2/68.

6. *The Union vs. the picketing*

In view of what appears to be the General Counsel's position that the Union concurred or at least acquiesced in the picketing activities of the two dischargees, in addition to what has already been noted of the differences expressed between the Union's approach to the processing of grievances with respect to the issue of racial discrimination under the bargaining agreement and that pursued by Hawkins and Hollins, it is noted that W. Griffin, the Union's business agent, testified that Johnson did not advise these employees to picket, but told them it was up to them as individuals, that they could take whatever "actions they wished," but he hoped they would follow the union program through arbitration and the Adjustment Board. Griffin further testified that after the picketing started he told Hawkins that they—the picketing employees—were going the wrong way about it, that they should "let the Union handle it." Johnson testified that he never warned or instructed employees not to engage in activities on their own, but at the September meeting, when some employees exhibited frustration, and it was suggested that The Emporium be picketed, the employees were informed "that we had a contract, we couldn't participate in any boycotting activities, that individuals could take whatever

action they wanted to as long as it was legal," that "an individual had a right to take action that a Union could not take." He advised the employees that if the matter went to arbitration it might take as much as 7 months to get a decision, but, according to him, they wanted something "dramatic." "I informed them," he testified, "what an individual wanted to do on their own, they could do, but I wasn't going to engage in any drama, but I wanted some orderly legal procedures that would have some long lasting effect." Johnson further testified that he told the employees that the Union accepted no responsibility for their actions as individuals as long as it was not concerned with the contract. "We will advise them as to what we thought was the best procedure, but it was obvious that our advice didn't carry much weight at the time." Finally, Johnson testified that about the time the pamphlets were being distributed by those picketing he talked to Hollins, told him that he did not want to see him fired, and that the only way to resolve the matter was through arbitration. It was then that Hollins replied that the "only one" they wanted to talk to was the president of Respondent, Batchelder.

The Union did file a complaint or protest with the Retailer's Council on the discharge of Hawkins and Hollins, but did not file the charge which initiated this proceeding.

7. *The evidence on discrimination*

The General Counsel very properly disavowed any intention or purpose of establishing as a fact that the

Respondent discriminated against any of its minority employees, but because of the wording in footnote 6 of the Board's Supplemental Decision in *Tanner Motor Livery, Ltd.*, 166 NLRB No. 35, namely: "It is sufficient for the purposes of this decision that the employees had a reasonable basis for so believing [that there was a discriminatory hiring policy based on racial origins]" and pursuant to the Trial Examiner's prodding, introduced such evidence as he considered proper to show "reasonable basis."[5] In doing so, Hollins and Hawkins were interrogated on their knowledge of discriminatory acts engaged in by Respondent, and the General Counsel and Respondent jointly introduced a summarization of Respondent's hiring and promotion records. It is further noted that in its warning notice to Hawkins and Hollins, Respondent specifically charged them with falsely accusing Respondent of racial discrimination, and acting in a manner intended to injure the reputation of The Emporium. Because of these several considerations, and because of my own uncertainty as to what the Board would regard as a "reasonable basis" for the publications issued by Hollins and Hawkins as part of their picketing activities, I note briefly such evidence as was produced on the issue of racial discrimination.

Reference has already been made to complaints made to the Union of Respondent's failure to promote

[5] Actually, the General Counsel's position, as I understood it, was that the good faith of those engaging in the picketing and related activities was all that was required to establish the protected nature of those activities.

Russell Young. Both Young and one other apparently the subject of complaints of racial discrimination, received promotions prior to any of the activities engaged in by Hawkins and Hollins which caused their discharges. Although questioned at some length in the matter, the only actual case of discrimination that either Hollins or Hawkins was able to recall had to do with Respondent's failure to make Hollins a supervisor. It appears that sometime prior to October, 1968, Hollins' supervisor told him that he considered him "very highly to become a supervisor," but that to do so he would have to get a haircut. He was then wearing his hair in what is generally known as an Afro-natural haircut. Apparently he refused and was not made a supervisor at that time. In October, 1968, when the supervisor in his department became ill, he was asked to take the position of temporary supervisor and did so, with the pay of supervisor, whether with or without the suggested haircut is not shown.[6] He was told at that time that he was "suited" for the job of permanent supervisor and that Graff, his superior, would like to see him take it. Hollins replied that he did not want the job because he had been previously "passed over." This occurred before Hollins had engaged in any of the activities which precipitated his discharge. As to Hawkins' testimony that

[6]Hollins acted as temporary supervisor for a comparatively brief period in the fall of 1968, after which he refused the position of permanent supervisor. It does not appear from the evidence that as acting supervisor he exercised independent judgment sufficient to constitute him a supervisor within the meaning of the Act, and for the major portion of his time exercised no supervisory functions whatever. Accordingly, I have treated him as a rank-and-file employee.

Hollins was denied a supervisor's badge, Hollins admitted that he did not know whether temporary supervisors normally wore badges.

This is the single specific case of alleged discrimination alluded to in the testimony of Hawkins and Hollins. Otherwise, their testimony on their "belief" that Respondent engaged in racial discrimination rested on the "beliefs" of others. Following their press conference and first instance of picketing, they canvassed a number of employees from minority races and compiled notes on the responses they got, responses which showed that these minority employees believed they were discriminated against. Obviously, this could not have motivated their picketing activities in the first instance.

The General Counsel in stressing the "reasonableness" of the dischargees' belief, relied on Respondent's employment records filed with EEOC which showed, *inter alia,* that less than two percent of the total complement of Respondent's officials and managers were from minority groups; and that Respondent had only one minority employee in a total of 47 on-the-job trainees. On the other hand, Respondent's assistant president for the past eleven years, Howard Carber, testified without contradiction that employment records filed with EEOC, referred to above, were not limited to The Emporium store where the dischargees were employed but to the entire Emporium organization which embraces numerous stores in different locations; that it was normal to start employees at the lowest rate unless he is a skilled crafts-

man, that both himself and Respondent's president started as stock clerks; that Emmett Powell, now traffic manager and a Negro, started as a stock clerk and was promoted some six times before achieving his present position; that Andrew Howard, a Negro, was promoted up through the ranks and presently directs some 500 employees; that The Emporium put black sales employees on the floor before any other department store in San Francisco; that any complaint of discrimination would be referred immediately to the personnel office and if sustained, corrective action would be taken.

8. *Concluding findings*

The discussion which follows will fall into two general categories: (a) whether the type of picketing with its boycott appeal and invective against the Respondent employed both orally and in the pamphlets distributed just outside Respondent's store, was protected activity. That it was "concerted" there is no doubt. (b) On the assumption that it was protected, whether the picketing and related activities engaged in by Hawkins and Hollins were violative of the terms of Respondent's bargaining agreement with the Union and inconsistent with and disruptive of the orderly course of procedures under that agreement for the settlement of grievances, to a degree that it would not effectuate the policies of the Act to extend its protection to such activities.

(a) Preliminarily it is repeated that there was neither violence nor threat of violence by those picket-

ing; entrances to The Emporium were not blocked; and no attack was made on Respondent's merchandise. That concerted employee activities with an object of bettering the working conditions of employees belonging to minority groups or to majority groups, for that matter, are protected under the Act is hardly open to challenge. The only real novelty in the *Tanner* case (*Tanner Motor Delivery, Ltd.*, 148 NLRB 1402), on which the General Counsel and the Charging Party rely, is that the concerted activities in that case had as its object the *hiring* of minority group employees. There is no evidence that the picketing which occurred here was to require the *hiring* of additional employees from minority groups, or that any complaint was registered on that ground with the Union or the Respondent at any time. Therefore the seemingly low percentage of hires from minorities shown by Respondent's employment records, had nothing to do with the employees' good faith or lack of it, in undertaking their picketing activities. The *Tanner* decision has limited application, if any, to the facts here, though some of the language used in that decision may be pertinent, if not controlling.

In *Tanner* the Board while explicitly making no findings and drawing no conclusions that the Employer actually discriminated against minorities in its hiring practices[7] found in its remand decision in the case (166 NLRB No. 35) that the Employer's failure to hire any Negroes among the 50 to 60 drivers em-

[7]There was in fact no substantial evidence in *Tanner* that any applicant for employment had ever been refused employment because of color or racial origin.

ployed in its business, was sufficient to establish that in their concerted protest the employees in that case "had a reasonable basis" for believing that discrimination in hiring existed, and that their "concerted protest . . . was not grounded on contrived or flimsy evidence, which otherwise might have reflected an intent more to harass their employer than to [eradicate] a noxious working condition."[8]

I have no hesitancy on the basis of *Tanner,* or independently of it, in finding that Hawkins and Hollins believed that Respondent was discriminating against Negroes and other minority groups in matters such as promotions and working conditions. They may well have believed that those conditions were "noxious," but I hasten to add that I draw no such conclusion on the evidence before me. The only concrete and probative evidence in this matter was the requirement that Hollins get a haircut in order to qualify as a supervisor. I would hesitate to conclude that such a requirement was racial discrimination solely because he wore his hair in Afro-natural style, without having a little evidence with respect to Respondent's general grooming requirements relating to both Whites and Blacks. To be sure, as a witness Hollins appeared to me to be literate, lucid, presentable, and personable, but I am not Respondent's personnel director. It is entirely possible that Respondent might object to white males wearing beards and shoulder length hair,

[8]Presumably the Board, not having found that any discrimination in hiring actually existed, in its use of the term "noxious working condition" is referring to the employees' good faith belief rather than any conclusions of its own.

or its Chinese employees wearing their hair in the traditional queue, but what business is that of ours? (The question is purely rhetorical.)

Nor would I draw an inference of discrimination on the basis of the statistical showing of hirings and promotions relating to minority groups without a comparable showing of the ratio of applicants as between minority and majority groups and their comparative qualifications, work records, and reasonable expectations of advancement. In short, only a God-given expertise could substitute for this lack of evidentiary facts, an expertise I do not possess and that could not be derived from the somewhat less sacred precincts of officialdom.

I base my finding and conclusion that Hawkins and Hollins acted in good faith belief that Respondent was practicing discrimination against minority employees solely because it was the official position of the Union (of which they had knowledge) and the belief was widespread among Emporium employees.[9]

Given good faith in their picketing activities, the next problem is whether Hawkins and Hollins took themselves out of the protection of the Act by the invective they used both orally and in the pamphlets they distributed, coupled with a call for a boycott by a minority race. To recapitulate, the invective in question accused The Emporium of discrimination in working conditions accorded their minority employ-

[9]This finding is not grounded on the saying that "where there is smoke there is fire," only that where there is so much smoke one may have a good faith belief that there is fire.

ees, called it a "20th Century Colonial Plantation," equated its treatment of Negro employees with the "Slave Mines of South Africa," employed the term "Racist Pig" in referring to Respondent, and made this appeal: "Wherefore, we encourage all of our people to take their money out of this racist store, until black people have full employment and are promoted justly through-out the Emporium."

A certain amount of name-calling and exaggeration has been found permissible when occurring in collective bargaining sessions, and in strike and picketing cases. At times the use of abusive epithets has been ascribed to "animal exuberance" or termed "spontaneous." This cannot apply here. Before there had been any picketing the employees in question held a press and radio conference in which they used substantially the same language, and made substantially the same appeal. In short, whatever else may be said of the character of the total performance, it was premeditated, deliberate, made with an intent to do harm to Respondent's business, unless and until the Respondent made what those picketing would regard as an appropriate response. Attention has also been paid in the decisions to the environment in which the abusive conduct takes place, on or off the job, during or outside working hours, etc. Here the conduct occurred off the job and on the employees' own time. Had they while on the job, singly or concertedly, without immediate provocation addressed their supervisors or officers of management as "racist pigs," and been discharged therefor, I hardly think their em-

ployer would be faced with a complaint issued by this agency.[10] It seems to me that the employer suffers far greater injury when such accusations and abusive terms are addressed to the general public and used as incitation to boycott.

The General Counsel would distinguish this case from cases in which the protection of the Act was denied those acting concertedly because they attacked the Employer's product and such attack was unrelated to a labor dispute and unaccompanied by an appeal for public support. *N.L.R.B. v. Electrical Workers,* 346 U.S. 464; *Patterson-Sargent,* 115 NLRB 255, 38 LRRM 1134. The cases, as the General Counsel contends, are distinguishable. Here there was no attack on the quality of Respondent's merchandise, the attack was related to a labor dispute, and it was accompanied by an appeal to the public. I would be

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[10]Such language if accompanied by, say, a hefty shove, a poke in the nose or a kick in the posterior, would almost certainly deprive the offending employee of the protection of the Act no matter how great his good faith motivation, but on the theory (I presume) that "sticks and stones may break my bones but words can never harm me," we must distinguish between the use of epithets and corporeal assault, no matter how flagrant the former or how minor the latter, when we are dealing with strike or picket line activities. Language found permissible by the Board includes such choice epithets as "wop-bastard," "ignorant s-o-b," "scabby bastard," "goddamn bastards," etc., but the line is drawn at "indecent and obscene suggestions relating to biological and bodily functions" and language ascribing "the capability of committing an act so foul as to be unmentionable." *Efro Manufacturing Company,* 108 NLRB 245, 249; *Nutone, Inc.,* 112 NLRB 1153, 1171-1173; *American Tool Works Company,* 116 NLRB No. 247; *Longview Furniture Company,* 110 NLRB 1734, 1738 (in which the Board sets forth its rationale). If still interested, see *Bowling Green MFG. Co. v. N.L.R.B.* (C.C.A. 6, No. 18491), 72 LRRM 2301, and *Santa Fe Drilling Company v. N.L.R.B.* (C.C.A. 9, No. 22, 923), enf'ing 171 NLRB No. 27; *Terry Coach,* 166 NLRB No. 76.

reluctant to assume, however, that because verbal assaults are related to a labor dispute and attack an employer's reputation rather than the employer's merchandise, anything goes.[11] With a department store which must depend to a substantial degree on the patronage of minority groups, I should think the verbal assault in such terms as "racist pig" and "colonial plantation" would have a graver potential than an attack on the store's merchandise, and the public would be in no better position to determine the truth or falsity of the accusations.[12]

It is further observed that misstatements of fact, where not deliberately or maliciously false, do not remove an employee engaged in concerted activities from the protection of the Act, and I have already found that Hawkins and Hollins *believed* that Respondent was engaging in discriminatory practices relating to minorities. I have some question in my mind whether when a basis for the employer's discharge action is the untruthfulness of the employee's verbal assault, as it is here, we can dispose of the matter so summarily, but the decisions point in that direction. *Schnell Tool & Die Corp.*, 144 NLRB No. 52; *Tracy Towing Line, Inc.*, 166 NLRB No. 9, 65 LRRM 1575;

[11]As the Bard put it, "Who steals my purse steals trash, 'twas something, nothing, 'twas mine, 'tis his . . . but he who filches from me my good name robs me of that which not enriches him but makes me poor indeed."

[12]Cf. *C. A. Laboratories, Inc.*, 88 NLRB No. 140, 25 LRRM 1381, in which the protection of the Act was denied an employee who called his employer "fascist" and a "fascist lover," but in which the Board found the objectionable language was "not made in a bargaining conference or on a picket line, where lower standards of etiquette generally prevail. . . ."

Bowling Green Manufacturing Co., 169 NLRB No. 15, 67 LRRM 1125; *Home Restaurant Drive-In*, 127 NLRB 635. Cf. *Bowling Green Mfg. Co. v. N.L.R.B.*, (C.C.A. 6, No. 18491), 72 LRRM 2301, reversing 169 NLRB No. 15, 67 LRRM 1124. And where the decisions lead I must follow.

Returning to the language of the pamphlets itself, the General Counsel correctly observes that such terms as "racist pig" have become terms of common usage in the "contemporary civil rights struggle." (Parenthetically, it is noted that as adjudicators under the Act we do not belong in the contemporary civil rights struggle. Congress did not put us there.) I do not know, however, that the currency of this and like terms make them any the less terms of obliquy, or less damaging to the prestige of a department store such as The Emporium. I assume that their gravity depends a good deal on who is at the receiving end, and how great the potential for injury. Here, I think the gravity is substantial and the potential for injury considerable. I cannot say, however, from my study of the cases, that the Board has given persuasive weight to such factors in strike and picketing cases.

(b) *The concerted activities vs. the bargaining agreement*

What we have here is a group of four employees who set out on their own to rectify what they in good faith considered working conditions unfair to minority employees. Apparently, they were self-appointed for there is no evidence that they were

elected or in any way designated by minority employees generally to represent them, they alone walked out of the September 3 meeting, and it does not appear that they were joined in their picketing activities by other Emporium employees. We are concerned with only two of them, Hollins and Hawkins, the other two not being named in the complaint. It matters not whether we as individuals approve or disapprove their conduct, for if we approved it in toto there would still remain the issue of whether their activities ran counter to the bargaining agreement by which the Respondent was bound and had the effect of requiring, if their demands were to be met, that the Respondent bargain on two fronts when it was required by law to bargain on only one. On the entire evidence I am convinced that their activities did run counter to the bargaining agreement and did have that effect.

Aside from the clause outlawing racial and other discrimination, the bargaining agreement set up a comprehensive procedure for the adjustment and arbitration of grievances. The Union was bound to follow those procedures and so was the Respondent. The picketing employees were not satisfied to follow those procedures, but in the words of the Union's president, wanted something "dramatic." The Union declined to submit to their demands that grievances be prosecuted on a store-wide rather than an individual basis, or to endorse their resort to the "dramatic" by way of picketing and the distribution of accusatory pamphlets. There is no basis in the evidence for a finding that the Union approved, endorsed, or in any way

connived in the action taken by the four employees. They were told that the Union would consider it illegal for it to engage in such activities, but they could do what they pleased as individuals. Obviously, the Union could not stop them from acting as individuals, and beyond attempting to persuade them against the course they took, was powerless to prevent it. It would be absurd to say that because they and the Union had a common ultimate objective, these four employees were somehow implementing or strengthening the Union in its position. They were acting outside the agreement and contrary to the Union's advice and urging. All the evidence indicates that the Union, their duly designated bargaining representative, was endeavoring in every way available to it under the agreement to adjust any and all cases of racial discrimination brought to its attention, and in at least one and apparently two cases had brought about the desired adjustment. It is also evident that it was prepared to resort to arbitration to enforce its position that racial discrimination in conditions of employment existed in Respondent's store, and was handicapped in proceeding by the four employees' refusal to assist or to be represented by the Union in the matter.[13]

The evidence further establishes that this was no mere presentation of a grievance, but nothing short of

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[13]Apparently the General Counsel would find the Union's action in filing a complaint with respect to the discharge of the two employees, approval or acquiescence in the action they took. The Union which properly considered that it represented all the employees in the bargaining unit, including Hollins who never affiliated with it, took this formal action because it no doubt considered

a demand that the Respondent bargain with the picketing employees for the entire group of minority employees. This is shown by Hollins' meeting with Respondent's president, Bachelder, in which he told the latter that he wanted to "discuss what was happening among minority employees," his later insistence that those picketing would be satisfied with nothing less than a meeting with Batchelder, and Hawkins' testimony that those picketing were seeking to "talk to the top management to get better conditions for The Emporium," that those picketing were seeking to accomplish their objectives through "group talk and through the president if we could talk to him." It is further clear that the Respondent never refused to have an informal discussion with these employees and referred them to Respondent's personnel director for such discussions, and that they scorned such talks and insisted on negotiating directly with Batchelder.

In sum, to extend the protection of the Act to the two employees named in the complaint would seriously undermine the right of employees to bargain collectively through representatives of their own choosing, handicap and prejudice the employees' duly designated representative in its efforts to bring about a durable improvement in working conditions among employees belonging to racial minorities, and place on

it its duty to do so in its representative capacity. It is noted, however, that it did not file the charge which initiated this proceeding. To read approval and acquiescence into its formal action would be strained to say the least, and contrary to all the evidence establishing the Union's disapproval of action taken by the dischargees which caused their discharge, and effort to persuade them against taking such action.

the Employer an unreasonable burden of attempting to placate self-designated representatives of minority groups while abiding by the terms of a valid bargaining agreement and attempting in good faith to meet whatever demands the bargaining representative put forth under that agreement. Therefore, aside from the issue of whether the picketing employees engaged in invective and incitation to boycott which denied them protection in their concerted activities,[14] I would dismiss the complaint in this proceeding.[15]

IV. Conclusions of Law

1. Respondent is an employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not engaged in unfair labor practices violative of Section 8(a)(1) of the Act, as alleged.

[14]A matter which I have felt compelled to set up in some detail in the event this decision is reviewed by higher authority.

[15]The warning notice given the two employees establishes the basis on which the discharge action occurred. That notice gave two reasons for the discharge which would follow if they continued in the activities complained of: the untruth of the statements they were making about racial discrimination, and that they were acting outside the ample legal remedies that existed to correct any discrimination that occurred. The reference to legal remedies is reasonably construed as meaning that their course of action lay outside the terms of the bargaining agreement which Respondent and the Union were bound to follow. Cf. *Tanner Motor Livery*, 166 NLRB No. 35.

V. Recommended Order

It is recommended that the complaint be dismissed.[16]

Dated: Oct 20 1969

/s/ William E. Spencer
William E. Spencer
Trial Examiner

[16]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

ORDER CORRECTING TRANSCRIPT

On the General Counsel's unopposed motion to correct the transcript of proceedings in the subject case, the following corrections are ordered:

Page	Line	Correction
8	13	change "an objection to their" to "evidence of the"
37	25	change "1966" to "1968"
47	14	change "agreements" to "grievance"

On the Trial Examiner's own motion the following corrections are ordered in statements attributed to the Trial Examiner:

33	18	change "efforts" to "evidence"
44	25	change to read "witnesses who was on the picket line if that was
45	1	add after "wouldn't" the words "admit it."
45	2-5	change to read "The illegal object is not going to be established because of the mental state of somebody on the picket line."
94	18	change "of" to "that"
106	10	strike in its entirety

Dated: Oct 20 1969

/s/ William E. Spencer
William E. Spencer
Trial Examiner

STATUTES

Section 7 of Labor-Management Relations Act:

Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3).

Section 9(a) of Labor-Management Relations Act:

Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

42 U.S.C. § 2000e-3(a):

§ 2000e-3.

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 1981:

Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1983:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.